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# Constitutional Courts, Legislative Autonomy, and Democracy: What Price Rights?

Kathleen Barrett

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# CONSTITUTIONAL COURTS, LEGISLATIVE AUTONOMY, AND DEMOCRACY: WHAT PRICE RIGHTS?

by

KATHLEEN BARRETT

Under the Direction of Dr. Robert Howard

## ABSTRACT

Why are national constitutional courts able to affect the actions of national legislatures? The roles and relationships of both constitutional courts and legislatures are defined in the national constitution. Although there is variance across countries, in general constitutional courts are empowered to ensure that laws conform to the principles and values enshrined in the constitution. National legislatures are, at least to some extent, required to conform legislation to the decisions of the constitutional court. Yet both the constitutional court and legislature could alter or avoid these roles. Constitutional courts can expand or contract their duties by applying the constitution in either a broad or restricted manner. Similarly, national legislatures can expand or contract the influence of the constitutional court by complying with or ignoring past and future constitutional court decisions.

This dissertation builds on the works of Fish and Kroenig (2009), Schimmelfinng (2006), Maveety and Grosskopf (2004), Finnemore (2003), and Stone (1990) to explain the balance of power

between national constitutional courts and national legislatures in the protection and extension of fundamental rights and democracy. By creating a measure of constitutional court autonomy and using both qualitative and quantitative methods, this dissertation will seek to demonstrate that national constitutional court and legislative autonomy must be viewed from both the national and supranational perspective and that a reduction in national legislative autonomy may increase national diffusion of democratic norms and the protection of human rights.

INDEX WORDS: Constitutional courts, Human rights, International law

CONSTITUTIONAL COURTS, LEGISLATIVE AUTONOMY, AND DEMOCRACY: WHAT PRICE RIGHTS?

by

KATHLEEN BARRETT

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

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CONSTITUTIONAL COURTS, LEGISLATIVE AUTONOMY, AND DEMOCRACY: WHAT PRICE RIGHTS?

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## **DEDICATION**

This dissertation is dedicated to my husband, Larry Barrett, who supported and encouraged me throughout. It is also dedicated to my friends who asked how it was going then listened as I described the topic and process in detail.

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## TABLE OF CONTENTS

ACKNOWLEDGEMENTS .....	v
LIST OF TABLES .....	x
LIST OF FIGURES.....	xii
<b>1 INTRODUCTION .....</b>	<b>1</b>
1.1 Research Question Introduced.....	2
1.2 The Changing Terrain of Politics and Legislative Autonomy.....	5
1.3 The Political Behaviors of Constitutional Courts and Legislatures.....	7
1.4 Supranational Influences .....	13
1.5 Rights and Constrained Legislatures.....	16
1.6 Chapter Overview .....	17
<b>2 JUDICIAL INDEPENDENCE, AUTONOMY, AND INFLUENCES .....</b>	<b>19</b>
2.1 Introduction.....	19
2.2 Judicial Independence and Autonomy.....	21
2.2.1 <i>Defining Judicial Independence</i> .....	22
2.2.2 <i>Is Complete Independence Possible</i> .....	24
2.2.3 <i>Is Complete Judicial Independence Necessary</i> .....	26
2.2.4 <i>A Middle Ground</i> .....	27
2.2.5 <i>Judiciary in Authoritarian Regimes</i> .....	31
2.3 Constitutional Court, Legislative, and Supranational Interactions .....	34
2.3.1 <i>Constitutional Design</i> .....	34

2.3.2	<i>Constitutional Court Benefits</i> .....	36
2.3.3	<i>Parties and Interest Groups</i> .....	37
2.4	Constitutional Courts and International Human Rights .....	39
2.5	European Union Factors Impacting Autonomy .....	41
2.6	Supranational and National Legal Impacts on Legislatures .....	45
2.7	Hypotheses .....	48
2.8	Conclusion .....	50
3	METHODOLOGY.....	52
3.1	Hypotheses, Variables, and Data .....	53
3.2	Cases .....	65
3.3	Conclusion .....	67
4	FIRST HYPOTHESIS .....	69
4.1	Variables.....	69
4.1.1	<i>Protection of human rights</i> .....	69
4.1.2	<i>Constitutional Court Autonomy</i> .....	78
4.2	Analysis .....	83
4.3	Expanded Assessment .....	97
4.4	Corollaries.....	105
4.5	Discussion .....	108
4.6	Conclusion .....	110

<b>5</b>	<b>SECOND HYPOTHESIS.....</b>	<b>112</b>
5.1	Variables.....	113
5.1.1	<i>Constitutional Court Constraints on National Legislatures .....</i>	<i>113</i>
5.1.2	<i>Supranational Constraints .....</i>	<i>118</i>
5.2	Analysis .....	121
5.3	Discussion .....	127
5.4	Conclusion .....	129
<b>6</b>	<b>THIRD HYPOTHESIS.....</b>	<b>131</b>
6.1	Variables.....	131
6.1.1	<i>Use of International Law in Constitutional Court Decisions .....</i>	<i>131</i>
6.1.2	<i>Transition to Democracy.....</i>	<i>145</i>
6.2	Analysis .....	147
6.3	Discussion .....	151
6.4	Conclusion .....	153
<b>7</b>	<b>CONCLUSION.....</b>	<b>154</b>
7.1	Research Question and Hypothesis .....	154
7.2	Hypothesis Results .....	155
7.3	Additional Considerations .....	157
7.4	Impact on Research Questions.....	167
7.5	Relation to Existing Research.....	170

<b>7.6</b>	<b>Future Research .....</b>	<b>173</b>
<b>7.7</b>	<b>Conclusion .....</b>	<b>173</b>
	<b>REFERENCES .....</b>	<b>175</b>

## LIST OF TABLES

Table 1.1 Illustrative Constitutional Court and Legislative Behaviors .....	12
Table 4.1 CIRI Data for Cases from 1990 Through 2010 .....	70
Table 4.2 De Facto and De Jure Constitutional Court Autonomy .....	79
Table 4.3 Total CIRI and Autonomy Scores .....	83
Table 4.4 Condensed Cases.....	87
Table 4.5 Constitutional Court Autonomy, GDP, and Human Rights.....	90
Table 4.6 Results of Ordinal Logit Regression.....	92
Table 4.7 Results of Ordinal Logit Regression with GDP per capita.....	93
Table 4.8 Odds Ratio Results of Ordinal Logit Regression with GDP per capita .....	94
Table 4.9 Hausman-Taylor Estimation .....	95
Table 4.10 Results of Ordinal Logit Regression with Expanded Cases.....	98
Table 4.11 Results of Ordinal Logit Regression with Expanded Cases with GDP per capita.....	99
Table 4.12 Odds Ratio with Expanded Cases with GDP per capita .....	100
Table 4.13 Results of Ordinal Logit Regression with Expanded Cases and Variables .....	101
Table 4.14 Ordinal Logit Regression with Expanded Cases and Variables using GDP per capita	103
Table 4.15 Odds Ratio with Expanded Cases and Variables using GDP per capita.....	104
Table 4.16 Results of Regression of De Facto Constitutional Court Autonomy and GDP .....	106
Table 4.17 Results of Regression of De Facto Constitutional Court Autonomy .....	107
Table 4.18 Regression of De Facto and De Jure Constitutional Court Autonomy .....	108
Table 5.1 Values for Constitutional Court Constraints by Country by Year .....	116
Table 5.2 International Constraints by Country by Year.....	119
Table 5.3 Poisson Regression of International Influences on Constitutional Court Constraints .	121
Table 5.4 Poisson Regression of Regional Influences on Constitutional Court Constraints .....	122

Table 5.5 Panel Regression of Constitutional Court Constraints and Human Rights .....	123
Table 5.6 Constitutional Court Constraints and Human Rights with GDP per capita .....	124
Table 5.7 Regression of Supranational Constraints and Human Rights Protections .....	125
Table 5.8 Regression of Supranational Constraints and Human Rights with GDP per capita ....	125
Table 5.9 Regression of Supranational Constraints and Human Rights.....	126
Table 5.10 Regression of Supranational Constraints and Human Rights using GDP per capita ..	127
Table 6.1 Use of International Law in Constitutional Court Decisions by Country.....	133
Table 6.2 Percent of Constitutional Court Cases Referencing International Law by Country .....	144
Table 6.3 Transition, Constitutional Court Decisions Referencing International Law .....	147
Table 6.4 Constitutional Court Decisions Referencing Intl. Law with Additional Countries.....	148
Table 6.5 References to International Decisions .....	149
Table 6.6 International Decisions and Human Rights .....	150
Table 6.7 International Decisions and Human Rights with GDP per capita.....	151
Table 7.1 Constitutional Court References to Intl. Law, Judicial and Parliamentary Trust .....	158

## LIST OF FIGURES

Figure 2.1 Constitutional Court Interactions .....	48
Figure 4.1 Summation of CIRI Values for Czech Republic 1990-2010.....	74
Figure 4.2 Summation of CIRI Values for Poland 1990-2010.....	75
Figure 4.3 Summation of CIRI Values for Romania 1990-2010.....	76
Figure 4.4 Summartion of CIRI Values for Slovak Republic 1990-2010 .....	77
Figure 4.5 CIRI Values for Czech Republic, Poland, Romanai, Slovak Republic 1990-2010 .....	78
Figure 4.6 Constitutional Court Autonomy.....	83
Figure 5.1 De Facto Constitutional Court Constraints on the Legislature by Country by Year....	116
Figure 7.1 Constitutional Court References to Intl. Law, Judicial and Parliamentary Trust .....	159
Figure 7.2 Czech Republic – Judicial Trust, Parliament Trust, and Human Rights .....	160
Figure 7.3 Poland – Judicial Trust, Parliament Trust, and Human Rights .....	161
Figure 7.4 Romania – Judicial Trust, Parliament Trust, and Human Rights .....	161
Figure 7.5 Slovak Republic – Judicial Trust, Parliament Trust, and Human Rights .....	162
Figure 7.6 Czech Republic – Judicial Trust, Parliament Trust, Constitutional Court Constraints.	163
Figure 7.7 Poland – Judicial Trust, Parliament Trust, Constitutional Court Constraints.....	163
Figure 7.8 Romania – Judicial Trust, Parliament Trust, Constitutional Court Constraints.....	164
Figure 7.9 Slovak Republic – Judicial Trust, Parliament Trust, Constitutional Court Constraints	164
Figure 7.10 Czech – Judicial Trust, Constitutional Court Constraints, and Human Rights.....	165
Figure 7.11 Poland – Judicial Trust, Constitutional Court Constraints, and Human Rights .....	166
Figure 7.12 Romania – Judicial Trust, Constitutional Court Constraints, and Human Rights.....	166
Figure 7.13 Slovak – Judicial Trust, Constitutional Court Constraints, and Human Rights.....	167
Figure 7.14 Constitutional Court Interactions .....	170

## 1 INTRODUCTION

In a Romanian Chamber of Deputies debate, the speaker stated that the current bill conflicted with a Constitutional Court ruling thus was a waste of time.<sup>1</sup>

A Polish Sejm debate considered whether the law under discussion fulfilled requirements of past Constitutional Tribunal decisions.<sup>2</sup>

The Czech Senate debate noted that overturning the bill passed by the Chamber of Deputies required a Constitutional Court challenge.<sup>3</sup>

Is this evidence of a democratically elected legislature ceding autonomy to the Constitutional Court? Is the result an improvement in human rights?

New democracies, particularly those transitioning from communism, face a daunting task. They must establish new constitutions (Zielonka, 2001), adjust their legal system (Reichel, 1999), develop a respect for individual rights (Roth, 2004), and develop democratic institutions (Pigenko, 2001). In Central Eastern Europe, they also face help and pressure from the European Union (Piana, 2003).

Post-communist countries established constitutional courts to protect against a reoccurrence of authoritarianism (Albi, 2009). In other words, constitutional courts are the protectors of democracy and human rights. Yet, in the above examples, it appears that the democratically elected legislatures are deferring to undemocratically appointed constitutional courts. Is this the case? If so, are those constitutional courts fulfilling the promise of human rights protections?

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<sup>1</sup> Spoken by Deputy Madaras on February 28, 1996.

<sup>2</sup> Debate of September 27, 1996

<sup>3</sup> Debate of September 12, 2004.



While much research speculates on the relationship between courts and legislatures, little research exists demonstrating this relationship and its impact on human rights. This dissertation fills that gap by documenting and assessing the influence of the constitutional court over the legislature, the conditions under which it occurs, and its impact on human rights.

### 1.1 Research Question Introduced

*“More and more often, the Constitutional Tribunal is called upon to make rulings and interpretations of laws which address matters of crucial importance to the country's social, economic and political life.” (Polish News Bulletin, 2010)*

*“Constitutional Court today suspended the ratification process of the Treaty on the European Constitution in Slovakia, having accepted a complaint by a group of citizens who suggested that the adoption of the Treaty by the National Council [Slovak parliament] had been unconstitutional.” (Radio Slovakia, 2005)*

*“Romania's highest court ruled that government-imposed pension cuts are unconstitutional, casting doubt on Bucharest's ability to shrink its budget deficit and raising questions about whether the country will qualify for further help from the International Monetary Fund. The decision, handed down by the Constitutional Court Friday in Bucharest, underscores the potential problems facing other European governments as they struggle to push through unpopular spending curbs and adhere to limits set in bailout agreements with international lenders” (Fairclough, 2010)*

The above quotes from both national and international news sources illustrate that constitutional courts – courts that have the ability to rule on the constitutionality of legislative action - significantly influence national legislation and legislative outputs legislatures. While this power has been

a long-standing attribute of many national courts, as constitutional courts increase their awareness and use of international law, they now can include those sources as in their review of national legislation. This has serious implications for democracy. These powerful unelected bodies are extra national sources to alter, change and influence national policy.

National constitutions define the roles and relationships of constitutional courts and legislatures. Although there is variance across countries, in general constitutional courts ensure that laws conform to the principles and values enshrined in the constitution. National legislatures are, at least to some extent, required to conform legislation to the decisions of the constitutional court. Yet both the constitutional court and legislature could alter or avoid these roles. Constitutional courts can expand or contract their duties by applying the constitution in either a broad or restricted manner. Similarly, national legislatures can expand or contract the influence of the constitutional court by complying with or ignoring past and future constitutional court decisions.

Two widely accepted measures of democracy are competition and free and fair elections (Dahl, 1971). A political system that fosters competition and free elections requires the protection of civil and political rights. Also required is respect for the rule of law; the “rules of the game” documented in the national constitution, and subsequent legislative actions. To accomplish this, democracies structure their government in a way that ensures the legislative branch remains independent from both the executive and judicial branches (Federalist 51). They believe is that the independence of branches fosters representation, competition, and political debate (Federalist 51). Does legislative independence prevent the constitutional court from demanding specific changes to legislative actions?

Constitutional courts established after World War II were a symbol of democracy and protection against the return of dictators (Solyom, 2003). The expectation was that they would protect and consolidate democracy by protecting the rights and legal principles enshrined in the national constitution (Solyom, 2003). Consequently, constitutional courts had the power to review legislative

actions for conformity with the constitution (Solyom, 2003). If they constitutional court found a piece of legislation unconstitutional they had two options. They could annul the legislation. Alternately, they could return the legislation to the legislature for changes prior to enactment. Such decisions set precedent and guidelines for future legislation.

Instead of seeing constitutional courts as defenders of democracy (as described above) some argue they are institutions struggling to maintain their efficacy in an increasingly populated legal environment (Schimmelfennig, 2006). Regional and international courts are increasing jurisdiction and legitimacy at the expense of national constitutional courts (Schimmelfennig, 2006). To justify their jurisdiction and perceived value constitutional courts are beginning to identify themselves as “niche vendors” in the protection of human rights (Schimmelfennig, 2006).

At the same time, legislatures are turning policy debates into constitutional court cases (Pehe, 1991). These cases give national constitutional courts opportunities to protect and expand rights. In addition, by incorporating supranational and international jurisprudence, constitutional courts can protect human rights not enshrined in the constitution (Waters, 2007; Schimmelfennig, 2006). National legislatures, therefore, must consider the opinions of national constitutional courts as they draft and debate legislation, arguably decreasing legislative autonomy.

Current research focuses on the independence of national legislatures, the activism of the judiciary, or the strategic interaction between the two institutions. However, the role of the balance of power between the national legislature and national constitutional courts in the consolidation of democracy and protection of human rights receives little attention. Also largely ignored is the effect the limitations imposed by constitutional courts on legislative autonomy. Thus, are national constitutional courts in post-communist countries effectively protecting fundamental rights as evidenced by independent measures of human rights? Are national legislatures considering constitutional court decisions, past or future, as they draft legislation thus constraining their actions? Furthermore, are

national constitutional courts utilizing supranational and international law to strengthen their position vis-à-vis the national legislature and, therefore, disseminating international norms of democracy and human rights?

This dissertation builds on the works of Fish and Kroenig (2009), Schimmelfennig (2006), Maveety and Grosskopf (2004), Finnemore (2003), and Stone (1990) to explain the balance of power between national constitutional courts and national legislatures in the protection and extension of fundamental rights and democracy. It creates a measure of constitutional court autonomy and uses both qualitative and quantitative methods to test three hypotheses. It demonstrates that national and supranational factors affect both constitutional court and legislative autonomy. This dissertation seeks to determine if limits imposed on legislative autonomy by national constitutional courts and supranational institutions further the consolidation of democracy and protection of human rights. Therefore, this dissertation evaluates the interactions of the national legislature, constitutional court, and supranational institutions. Approaching these relationships from a strategic perspective, it posits that limitations on legislative autonomy by constitutional courts and supranational institutions are necessary to protect democracy and human rights. To test this argument this dissertation focuses on post-communist countries under the jurisdiction of the supranational institutions of the European Union.

## **1.2 The Changing Terrain of Politics and Legislative Autonomy**

How important is national legislative autonomy in the changing terrain of politics? The independence of legislatures (a term used here as interchangeable with parliaments) from the other branches of the government is an established component of democracy. An independent, unconstrained legislature can prevent abuses of powers by the executive and judicial branches. This ability of the branches to check each other is necessary for the execution, preservation, and consolidation of democracy. Furthermore, legislatures are the voice of the people in government.

Yet actions in the name of democracy and the protection of human rights are challenging legislative autonomy, and their ability to perform their functions without interference. This situation is prevalent in post-communist Europe where legislatures are attempting to build a democratic government, represent their constituencies, protect human rights, and establish their independence in an environment where constitutional courts have a reputation for being activist. These legislatures also face pressures from supranational institutions, such as those of the European Union. European institutions establish rules and norms, including those related human rights, ensuring protection for citizens of all the member countries. National legislatures must abide by the European directives. In addition, transnational organizations, which are increasing efforts to diffuse democratic and human rights norms also pressure national legislatures.

Existing research assess the autonomy of legislatures in relation to the executive branch and the European Union (EU). Research also explores the combined impact of the European Union and national constitutional courts on the development of the national legislature's autonomy. However, existing research ignores the relationship between the constitutional court and legislature in the consolidation of democracy and protection of human rights. Do constitutional courts empowered by European Union court decisions support or undermine the autonomy of legislatures and consolidation of democracy? Have the institutions of the European Union supported the efforts of national legislatures to consolidate democracy or have they spread democracy by eroding the autonomy of national legislatures?

Three hypotheses derived from the works of Fish and Kroenig (2009), Schimmelfennig (2006), Maveety and Grosskopf (2004), Finnemore (2003), and Stone (1990) assess the effects of national and supranational legal institutions on legislative autonomy and the consolidation of democracy in post-communist accession and pre-accession European Union countries. One hypothesis evaluates the ability of constitutional courts to alter national policy preferences reflected in legislation to comply with evolving human rights norms. The second hypothesis evaluates the ability of supranational legal

institutions to alter the interaction between national constitutional courts and legislatures. The third hypothesis assesses the impact of the transition to democracy on the influences on and of the constitutional court. Using both qualitative and quantitative methods, this dissertation seeks to demonstrate that a reduction in national legislative autonomy increases national diffusion of evolving international human rights norms.

This dissertation uses constitutional court decisions and legislative debates in Poland, the Czech Republic, Slovakia, and Romania to test these hypotheses. If constitutional courts are undermining legislative authority, the legislative debates should reflect both a consideration of past and future constitutional court decisions and a willingness to follow constitutional court directives in structuring legislation. Conversely, there is no impact to legislative autonomy if references to the constitutional court are missing from legislative debates. Constitutional court decisions reflect supranational influence through references to international law and jurisprudence. Conversely, if constitutional court decisions rely only on national law there is no proof that the court is using international law and norms to protect democracy and human rights.

However, both constitutional courts and legislatures are political bodies and, therefore, behave politically. Consequently, to understand the relationship between legislatures and constitutional courts, one must understand the political behaviors of these institutions. The next section will discuss the political behaviors of the legislature and constitutional courts.

### **1.3 The Political Behaviors of Constitutional Courts and Legislatures**

The behaviors of constitutional courts and legislatures toward each other vary both across and within countries. Constitutional courts and legislatures can be confrontational, openly disagreeing with each other, or cooperative, working in tandem to foster the aims of the state. Each of these behaviors can serve to protect the rule of law and democracy in the state. Confrontational behavior between the

constitutional court and legislature allows the two institutions to communicate with each other, air disputes for public understanding and reaction, and allow each institution to check the power of the other. Cooperative behavior between the constitutional court and legislature provides a united front against the powers of the executive and allows a separation of responsibility to achieve policy ends for the state. It is possible that the variance is attributable to the state's transition to, and consolidation of, democracy. Europe provides multiple examples of these different behaviors.<sup>4</sup>

Poland and Hungary provide examples of cooperation between constitutional courts and legislatures to check the powers of the executive. When the Polish executive, Lech Walesa, attempted to expand his powers during the early 1990s, the constitutional court was able to provide an effective check on his actions (Schwartz, 1998) through decisions that were final and binding.<sup>5</sup> Realizing the value of the constitutional court to democracy, architects of the new constitution of Poland removed some of the constraints originally placed on the court (Schwartz, 1998). By rewarding the efforts of the constitutional court, the legislature demonstrated its solidarity with the court in its efforts to protect the developing democracy. Similarly, the Hungarian Constitutional Court cooperated with the Parliament and Prime Minister when, in 1991, it ruled in favor of a weak presidency and limited the powers of then

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<sup>4</sup> Although these examples use Europe because it is a single region with multiple examples and it has influential supranational courts, it is not the only region with multiple examples. Constitutional courts in the Philippines and South Africa also provide examples of confrontational relationships with the legislature when the constitutional courts held the legislatures to democratic norms. Interviews of justices on the Philippine Supreme Court (functions as a constitutional court) demonstrate that the court views social justice as a function of the court, a role that is reflected in decisions that protect and compensate the poor (Haynie, 1994). Given the importance of the Philippine elites, and their interests, the court can protect the poor and support overall state policies (Haynie, 1994) without costing the legislature political capital. Although the Philippine Constitution outlines the cases for which the Supreme Court has jurisdiction, the Congress is given some power to control the actions of the court (Philippine Constitution), thus Congress has avenues for retaliation should they feel the court was acting beyond its means. In South Africa the constitutional court adjudicated the importance of social rights in South Africa (Pieterse, 2004). The South African Constitutional Court indicated the importance of social rights in its decision of the 1998 *Soobramoney* case, provided guidance in establishing policies in the 2000 *Grootboom* case, and dismissed the government's claim that social right matters were not justiciable in the 2002 *Treatment Action Campaign Case* (Pieterse, 2004). Since the South African constitution provides few opportunities for Parliament to retaliate by manipulating the role of the court, the court does rely on Parliament to refer laws for review and the decisions of the court are public providing Parliament opportunities to retaliate either by ignoring the constitutional court or publicly undermining its authority (South African Constitution). Thus, although avenues were open for legislative action, both the Philippine and South African courts were able to hold the legislature to the norms of democracy without retaliation.

<sup>5</sup> Based on the jurisdiction of the Polish Constitutional Court as reported in Jurist World Law.

president Árpád Göncz (Solyom, 2003; Schwartz, 1998). Unlike Poland, the Hungarian Constitutional Court's organization and operation can be regulated by the Hungarian Parliament (Hungarian Constitution Article 32/A). Consequently, the Polish and Hungarian cases demonstrate that cooperation between legislature and constitutional courts on matters of institutional powers can occur regardless of the legislature's power to influence the constitutional court. These examples from Poland and Hungary prompt important questions about why, and when, courts and parliaments cooperate to check executive power.

In Estonia, the constitutional court equivalent and legislature display cooperative behavior that separates responsibility to achieve policy ends for the state. Here the equivalent of the constitutional court is making tough decisions to protect the rights of citizens even when these decisions would impose severe political costs on the legislature. In 1998 cases protecting the linguistic rights of minorities,<sup>6</sup> the Estonian Supreme Court established protections for democratic rights despite lack of public support (Maveety and Grosskopf, 2004). If the legislature had taken the initiative to pass laws assuring these protections the repercussions could have been quite politically costly, but by trusting these decisions to the Supreme Court, the legislature was able to remove itself from blame while still ensuring the progression of democratic reforms (Maveety and Grosskopf, 2004). Despite the fact that the Supreme Court was acting without direct democratic support, it did so with the cooperation and support of the legislature (Decision 3-4-1-7-98) and by ensuring the decisions were carefully grounded in legal terms and justification (Maveety and Grosskopf, 2004). Although the Estonian Supreme Court did not make policy, it did set a path that the legislature could follow without expending political capital (Maveety and Grosskopf, 2004). In this example, we find reason to question why and when national parliaments would choose to cooperate with and cede policy initiative to a constitutional court.

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<sup>6</sup> Specifically the Language Act Amendment Case where the Court declared the amendment unconstitutional (Decision 3-4-1-1-98) and the Harju County Court Case where the Court supported the petition of the Harju County Court and annulled portions of the Language Act because they restricted the right to vote (Decision 3-4-1-7-98).



The Hungarian Constitutional Court also demonstrates a confrontational relationship with the legislature that resulted in a check on the legislature's power. In 1993, the Hungarian Constitutional Court refused to uphold laws that reset the statute of limitations in criminal cases, thus ensuring that the criminal law guarantees in the constitution could not be derogated (Solyom, 2003; Schwartz, 1998), forcing the legislature to follow existing due process in their efforts to achieve transitional justice. In this case the court could be seen as antagonizing the legislature, since it directly challenged actions of the legislature yet the legislature did not retaliate despite its ability to regulate the constitutional court (Hungarian Constitution Article 32/A). In Hungary, then, we must ask broader questions about the causes and consequences of aggressive, antagonist court behaviors vis-à-vis national parliaments. The subsidiary question, of course, is why, and when, parliaments tolerate such actions.

Confrontational behavior between the legislature and the constitutional court could also be the result of politics not associated directly with legal matters as evidenced by the behavior of the Ukrainian Parliament toward the constitutional court. In this case, the Ukrainian Parliament refused to elect its portion of justices and to swear in the judges appointed by both the president and judicial council thus rendering the Ukrainian Constitutional Court ineffective (BBC, 2006). Additionally, the Parliament passed a law limiting the constitutional court's ability to revise amendments to the Ukrainian constitution (Ukraine President, 2006). These actions were not a result of legislation before the court or actions of the court but political action by parties within the government to maintain power (Hilf Daily Briefing, 2006). Why is the Ukrainian Parliament exhibiting confrontational behavior by limiting the constitutional court rather than cooperatively working with them as legislatures in other countries have? Why do the political roles of the constitutional courts differ? Furthermore, why do legislatures choose to either support or attempt to restrain the constitutional courts?

Supranational courts such as the European Court of Justice can also influence the behavior of both the constitutional courts and legislatures. Indeed, the superimposition of supranationalism on the

questions raised above provides additional and intriguing justification for this study. Romania provides an example where confrontational behavior between the constitutional court and Parliament occurs because Parliament holds the constitutional court to the goals established by the supranational bodies. When, in a 2003 decision, the constitutional court overturned reforms that were necessary for accession of Romania to the European Union (Decision 148 of April 16, 2003) the legislature modified the reforms but threatened the court via the press to ensure approval of the revised reforms.<sup>7</sup> If the constitutional court had not passed the revised reforms, the legislature could have voted to override the court's decision (Romanian Constitution Article 145), an action that would have undermined the constitutional court. Yet the legislature upheld the position and legitimacy of the constitutional court by signaling to the court that it was pressing the boundaries the legislature intended to uphold. Why did the legislature choose to revise the reforms rather than override the constitutional court?

Table 1.1 provides a summary of the above examples. It lists the types of behavior (cooperative or confrontational), the country, the behavior of the constitutional court, and the behavior of the legislature.<sup>8</sup> These examples clearly demonstrate that the strategic interactions of constitutional courts and legislatures toward each other vary dramatically between cooperation and confrontation, both within and across countries. Poland and the Ukraine demonstrate the importance of these behaviors. Because the courts were behaving cooperatively in Poland they were able to work together to check the expansion of power by the President, and potential abuse of office, as the democracy developed (Schwartz, 1998). Conversely, the confrontational behavior by the Ukrainian legislature toward the constitutional court has resulted in rendering the one body that can protect the country against infringements of its constitution (BBC, 2006).

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<sup>7</sup> As reported in *The Economist*.

<sup>8</sup> Appendix B contains this table expanded to include all examples used in this proposal.

**Table 1.1 Illustrative Constitutional Court and Legislative Behaviors**

<b>Behavior</b>	<b>Country</b>	<b>Constitutional Court Action</b>	<b>Legislative Action</b>
Cooperative	Estonia	Court adjudicating policy path that legislature could follow	Legislature able to follow path without cost to political repercussion
	Poland	Constitutional court stopped expansion of presidential power	Legislature removed constraints on court
	Hungary	Ruled that presidency should remain weak and limited powers of president	No action to punish court through regulation of constitutional court
	Hungary	Struck legislation that would have extended the statute of limitations and allows prosecution of communist party members	No retaliation
Confrontational	Romania	Struck reforms mandated by the EU	Threatened the court through the press
	Ukraine	Constitutional Court is non-functioning	Block appointment of justices, remove jurisdiction over constitutional amendments

One can create a schema of behaviors from the actions of the constitutional courts and legislatures provided in the examples above. When constitutional courts and legislatures are cooperative they each take a role in protecting and enhancing both democracy and its associated rights.

Conversely, when constitutional courts and legislatures are confrontational courts adjudicate narrowly and in close adherence of the law and legislatures use constitutional means to limit the effectiveness and legitimacy of the courts.

While the extant literature provides some clues about conceptualizing and explaining these behaviors, conventional wisdom comes up short for two reasons. First, existing explanations fail to address the conditions under which these behaviors vary both within and across countries. In part, this is because the existing explanations do not address the development of the behaviors as the country transitions to democracy. Second, existing explanations focus on either the relationship between the supranational court and the national branches of government or the relationship between branches of government, neglecting the three-way interaction between supranational government, national legislature, and national constitutional court.

Supranational institutions increasingly influence national institutions such as constitutional courts and legislatures. This is particularly true for member countries of the European Union. The next section will discuss the impact of supranational influences on autonomy.

#### **1.4 Supranational Influences**

Supranational influences on both constitutional courts and legislatures can come from two different sources. The first is regional institutions. For example, if the country is a member of the European Union the laws, institutions, and jurisprudence of the European Union affect both the constitutional court and the legislature. Second, international institutions, such as the United Nations, international treaties, and the jurisprudence of international courts, affect the constitutional court and, to a lesser extent, the legislature.

The European Union affects both constitutional courts and legislatures in two ways. First, the European Union establishes laws and norms that member countries must follow. This requires national legislatures to pass laws enacting European Union treaties and prevents them from making laws that

would contradict European Union regulations, directives, and rulings. For example, the European Union regulates the number of hours that bus drivers may work in the member countries (UKDrivers.com, n.d.). Consequently, national laws may not authorize or require bus drivers to work longer hours. Similarly, decisions by the European Court of Human Rights (ECHR) may also require legislatures to change laws as in the case of the prisoners' right to vote (BBC, 2011). In this case, the British Parliament has to change British law to accommodate the ECHR ruling.

Another way the European Union affects national constitutional courts and legislatures is that it offers an alternative venue for national political dispute resolution. Individuals, groups, political parties, and organizations are able to access European Union institutions to effect change or to alter a law if they are not able to resolve the situation to their satisfaction at the national level. For example, a citizen of a member country can take a case to the European Court of Human Rights without first taking the case to the national constitutional court. Similarly, groups might have more success lobbying for laws at the European Union level than at a national level.

At the international level, a wide range of actors affects national legislatures and constitutional courts including the United Nations, international courts, other states, and transnational actors. The United Nations facilitates the creation, signature, and ratification of international treaties that become legally binding on a state. As a result, national legislatures must create laws to enforce the spirit of the treaties. When the international treaty becomes binding on the state constitutional court jurisprudence includes the treaty. This allows the constitutional court to ensure compliance with the rights and norms enshrined in the treaty.

Transnational organizations and states can use international treaties to force changes to national law and action. For example, the United States is under increasing international pressure to end the death sentence as countries use the Vienna Convention on Consular Relations to protect their nationals even if the person sees himself as an American citizen (The Week, 2011). The International

Court of Justice supported this position in three separate cases, *Paraguay v. United States*, *Mexico v. United States*, and *Germany v. United States*. Because of these efforts, United States Congress introduced laws to ensure future compliance with the treaty and a review of past cases.

These supranational influences do not affect national institutions equally. All supranational contact has the potential to influence both constitutional courts and legislatures through the sharing of ideas. Transnational actors, particularly non-governmental organizations advocating of human rights and democracy, can share ideas and strategies (such as legislation or legal arguments). Transnational actors can use these ideas to influence both constitutional courts and legislatures.

One method transnational actors use to influence constitutional courts and legislatures is legal dialogue. Constitutional courts engage in legal dialogue in two ways: through ideas presented by the parties to a case and through legal arguments used to justify decisions. However, constitutional court cases limit the scope of legal dialogue.

Legislatures focus on national rather than international policy. Therefore, their exposure to direct supranational influences is more limited than constitutional courts. Transnational actors and constitutional court decisions provide indirect supranational influence. Supranational influence of legislatures is stronger in the member countries of the European Union due to its enforcement of cross-national political parties.

It is important to include the supranational influences when considering the balance of power between constitutional courts and legislatures for two interrelated reasons. First, supranational human rights and democracy norms argued in front of the constitutional court result in either the support or nullification of legislative laws. Second, as legislative losers seek to advance national human rights and democratic norms they will move their argument to the constitutional court. Consequently, the political behaviors of the constitutional court and legislature occur in an atmosphere that includes supranational influences.

## 1.5 Rights and Constrained Legislatures

Efforts to limit the autonomous actions of national legislatures by national constitutional courts and international bodies share the common purpose of protecting democracy and human rights. As mentioned, the goal national constitutional was to protect against the destruction of democracy and human rights violations that resulted in World War II. Similarly, the goal of regional and international human rights treaties and courts was to ensure protection of human rights against state action. Therefore, in theory when constitutional courts invalidate part or all of a law enacted by the democratically elected legislature it protects democracy and human rights.

Constitutional court protection of human rights can be an important tool of the human rights advocate (Gearty, 2006). Strategic human rights litigation can effectively challenge laws that violate the rights of unpopular minorities (Yeazell, 2004). Similarly, litigation at supranational or international courts can influence national constitutional courts and legislatures. However, there is also a risk that strategic litigation will fail thus enforcing legislation perceived to violate rights (Van Glahn and Taulbee, 2013). Therefore, it is important to understand the relationship between constitutional courts, legislatures, and international bodies in the protection of human rights and democracy.

This dissertation contributes to the understanding of this relationship in three ways. First, it explores the ability of constitutional courts to alter the actions of legislatures. It is important to ensure that, once the constitutional court has made a ruling to protect democracy or a right, the legislature follows that ruling for both the law at issue and future laws. Second, this dissertation explores the ability of international laws and norms to alter the actions of both constitutional courts and legislatures. Protections for both human rights and democracy exist at both the regional and international level. National courts must use regional and international human rights laws and norms to ensure full realization of the protections. Finally, this dissertation assesses the impact of both constitutional court and international influence on the actual protection of human rights. It is important that both the

legislature and constitutional court discuss human rights and democracy. It is even more important that the talk becomes positive action; that the country does not backslide in terms of human rights.

This research is significantly different because it looks to legislative debates to consider the impact of both constitutional court decisions and international laws and norms. Existing research looks at judicial decisions or enactment of specific laws. It does not consider whether constitutional court decisions play a role in legislative debates on a regular basis. Existing theories posit that legislatures threaten to move the political debates to the courtroom but do not use legislative debates to identify the cause of frequency of this political strategy.

## **1.6 Chapter Overview**

This dissertation will progress as follows. The next chapter reviews existing literature and identifies the weaknesses in explaining the research question. Extant research on legislative and constitutional court autonomy (including its relationship to judicial independence) and supranational influence on the legislature and constitutional court is included. Chapter Two concludes with a proposed explanation of the shifting balance of power between the national legislature and constitutional. The explanation incorporates the following: Fish and Koenig's (2009) measure of legislative power; Schimmelfennig's (2006) view that constitutional courts are using human rights to ensure their efficacy; Maveety's and Grosskopf's (2004) view of constitutional courts as disseminators of institutional norms; Stone's (1990) view that constitutional courts alter the policy making process; and Finnemore's (2003) view that international politics has been altered by the legalization of ideas. The chapter closes with an explanation of hypotheses that used to test this theory.

The third chapter explains and justifies the methodology used in this dissertation. Included is a detailed explanation of the quantitative and qualitative tests of the hypotheses as well as their applicability to the subject. An explanation of each variable used in the tests, and their associated



measurements follows. The cases used to test the hypotheses are then justified. Finally, the chapter establishes the criteria needed for acceptance of the hypotheses.

The following three chapters test the hypotheses derived from the explanation presented in the second chapter. In each of these three chapters, is an explanation of the data associated with the test of the hypothesis and the results of the quantitative and qualitative tests.

The final chapter draws conclusions from the findings and reviews the impact on future research.

## 2 JUDICIAL INDEPENDENCE, AUTONOMY, AND INFLUENCES

### 2.1 Introduction

This chapter addresses four areas. First, it discusses existing research on judicial independence. This section explains that judicial autonomy is a subset of judicial independence. It is important to understand judicial independence before comparing it to legislative autonomy. Second, it discusses existing research on the interactions between constitutional courts, legislatures, and supranational courts. This includes identification of ways current research fails to address the research question. Third, it argues that combining the insights of five existing research efforts helps answer to the research question. The final section presents three testable hypotheses. Insights from the five research areas provide the basis for these hypotheses.

Democratically elected legislators draft, debate, and pass laws. Often citizens opposed to the laws challenge these laws as unconstitutional assertions of authority. These challenges assert that the laws violated civil, political, economic, or social rights; in short, the laws violate basic human rights. For example, the Czech legislature, following a European Union directive, passed a law mandating retention of telecommunications data (Paulsworth, 2011). The Czech Constitutional Court overturned parts of the law as a violation of the constitutional right to privacy (Göttinger, 2011).

National courts that determine the constitutionality of laws are Constitutional Courts. These courts are comprised of unelected judges nominated and confirmed by democratically elected officials. Constitutional Court judges can have long tenures. When reviewing laws these unelected constitutional courts have three options.<sup>9</sup> First, they can uphold the law. In this case, the law remains as it is and requires no further action by the legislature. Second, they can declare all or part of the law unconstitutional. This is the option chosen by the Czech Constitutional Court in the example above

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<sup>9</sup> NB: The three options listed here are categorical summaries of the existing research presented in this chapter. Citation of the underlying works occurs with the presentation of the research.

(Göttinger, 2011). When this occurs, the aspects of the law found to be unconstitutional are no longer in effect. Third, the constitutional court can instruct the legislature to make changes to the law. This option requires action by the legislature to amend the law.

If the constitutional court invalidates or mandates changes to the law the legislature also has three options.<sup>10</sup> First, the legislature can allow the law to remain invalidated. Second, the legislature can rewrite the law following the directives of the constitutional court. Third, legislature can ignore the constitutional court (Burbank and Friedman, 2002). The constitutional court has no method to enforce its decisions (Burbank and Friedman, 2002). Thus, there is nothing forcing the legislature to change laws as mandated by the constitutional court (Burbank and Friedman, 2002). Ideally, the legislature will follow the advice of the constitutional court both for the law in question and as they draft future laws.

The ability of unelected constitutional courts to direct how democratically elected legislatures write laws raises fundamental normative and empirical questions. First, does invalidating or changing laws passed by an elected body in the interest of human rights limit the ability of legislatures to act democratically? Second, do constitutional court decisions accurately and consistently reflect international standards of human rights and democracy? Alternatively, are the decisions localized, episodic, and uneven? Third, are constitutional court decisions influenced law, personal policy, or other factors? Fourth, do legislatures consider constitutional courts as they draft and debate laws? Fifth, do constitutional courts use international law to expand human rights protections? Finally, normatively, are judicial decisions protecting human rights worth the associated democratic and majoritarian limitations?

These are critical and important questions. They explore the fundamental nexus between constitutional courts, legislatures, and supranational norms of human rights and democracy. While existing research addresses specific areas related to these questions, much remains unexplored.

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<sup>10</sup> NB: Again, this is a summarization of the work presented in this chapter. The underlying research is cited as it is presented below.

For example, research addresses the strategy used by constitutional courts in their dealings with legislatures (see e.g. Epstein and Knight 1998; Segal and Spaeth, 2002). In the United States, given the three branches of government, this research is known as Separation of Powers literature. Other research examines the use of international law by constitutional courts (Waters, 2007; Schimmelfennig, 2006, Maveety and Grosskopf, 2004) or the interaction between supranational courts (such as the European Court of Justice) and national constitutional courts (Alter, 1998; Volcansek, 1990 and 1989). Finally, another avenue of research addresses the effort of constitutional courts to increase human rights protections (Schimmelfennig, 2006; Navia and Rios-Figueroa, 2005; Alter, 1998).

Despite these research efforts, key puzzles remain unaddressed. We do not know why legislatures allow constitutional courts to set guidelines for writing laws. Nor do we fully understand how constitutional courts affect human rights and democracy. Finally, little comparative research exists on the interactions between constitutional courts and legislatures.

## **2.2 Judicial Independence and Autonomy**

One key to increase understanding in this area is to understand the difference between judicial autonomy and judicial independence. There is significant research on judicial independence, but less on the separate but important idea of autonomy. Judicial independence debates center around three points: the definition of judicial independence; whether it is possible to have a fully independent judiciary; and, whether a completely independent judiciary is necessary. This section reviews existing research associated with each of these points.

### **2.2.1 Defining Judicial Independence**

The first debated point is the definition of judicial independence. Before any assessment of judicial independence occurs, we must understand what it involves. Consequently, we need a definition of the concept. Existing research centers around three definitions of judicial independence.<sup>11</sup>

One definition of judicial independence is that judges are able to decide cases without any outside influence (Staton et al, 2010; Rios-Figueroa and Staton, 2009). This involves freedom from personal and public sources (Simmons, 2007; Pasquino, 2003; Peretti, 2002). On the public level, a fully independent judiciary is free from influence by other branches of government (Simmons, 2007; Pasquino, 2003; Peretti, 2002). On the private level, judges on a fully independent judiciary are free from personal bias (Simmons, 2007; Pasquino, 2003; Peretti, 2002). This definition requires the judiciary to decide cases only according to legal principles (Simmons, 2007; Pasquino, 2003; Peretti, 2002).

However, some researchers feel that the above definition of a fully independent judiciary is too strict (Staton et al, 2010) and use a second definition that excludes concern with personal influences. They recognize that judges come to the bench with an inherent personal bias (Staton et al, 2010). Although personal bias influences judicial decisions, it does not compromise independence (Staton et al, 2010; Finn, 2004). However, independence requires insulation of the judiciary from the policy bias of other branches (Staton et al, 2010). This definition requires the judiciary to decide cases according to legal principles but acknowledges that personal bias will affect the interpretation and application of those principles (Staton et al, 2010; Finn, 2004).

The third definition bases independence on the outcome of judicial decisions (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002). To be independent judges rule as they feel is appropriate for the case (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank

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<sup>11</sup> Research concerning the definition of judicial independence includes: Staton et al, 2010; Rios-Figueroa and Staton, 2009; Simmons, 2007; Finn, 2004; Pasquino, 2003; Peretti, 2002; Burbank and Friedman, 2002; Cameron, 2002. Each of these are addressed in paragraphs that follow.

and Friedman, 2002; Cameron, 2002). An independent judiciary then has the power to enforce their ruling (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002). Consequently, independence is not dependent on the insulation of judges but on their ability to alter the behavior of others (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002).

The basic difference between these definitions of judicial independence is the role of influence over the judiciary (Staton et al, 2010; Rios-Figueroa and Staton, 2009; Finn, 2004). The first definition rejects influence over the judiciary from any source (Rios-Figueroa and Staton, 2009; Simmons, 2007; Pasquino, 2003, Peretti, 2002). This definition sees any influence as a reduction of judicial independence (Rios-Figueroa and Staton, 2009; Simmons, 2007; Pasquino, 2003, Peretti, 2002). The second definition only considers influence over the judiciary from outside sources (Staton et al, 2010). Personal bias and experience influence judges as they decide cases without affecting their independence (Finn, 2004). However, when other branches of government influence judges it reduces judicial independence (Staton et al, 2010). The third definition assesses the influence of the judiciary instead of influences on the judiciary (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002). This definition requires the judiciary to make and enforce the decisions they feel are appropriate for the case (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002).

An important differentiation in the definition of judicial independence is *de facto* versus *de jure* independence (Howard and Carey, 2004). Howard and Carey (2004) argue that legally guaranteed judicial independence (*de jure*) does not reflect the actual workings of the judiciary (*de facto*). Notably, *de facto* independence is an important component in the judicial independence definitions surveyed above. For example, personal bias (Staton et al, 2010; Finn, 2004) and respect for decisions (Rios-Figueroa and Staton, 2009; Pasquino, 2003; Burbank and Friedman, 2002; Cameron, 2002) can be

legislated but easily ignored (Howard and Carey, 2004). Therefore, consistent with Howard and Carey's (2004) argument, the reality of judicial independence, regardless of the definition, depends less on the law than the actual workings of government.

### ***2.2.2 Is Complete Independence Possible***

The second debate concerns the ability of any judiciary to be completely independent (Popova, 2010; Staton et al, 2010; Simmons, 2007; Finn, 2004; Burbank and Friedman, 2002; Peretti, 2002). Although complete independence of the judiciary may seem desirable, four arguments explain that this is not possible (Popova, 2010; Staton et al, 2010; Simmons, 2007; Finn, 2004; Burbank and Friedman, 2002; Peretti, 2002).

First, the design of democratic institutions encourages interdependence (Simmons, 2007; Finn, 2004). Democracies separate the act of making laws from the act of ensuring their legality (Simmons, 2007; Finn, 2004). In other words, democracies separate powers of government among branches (Simmons, 2007; Finn, 2004). Ideally, the power of one branch balances the power of the other (Simmons, 2007; Finn, 2004). Each branch has the ability to check an abuse of power by another branch (Simmons, 2007; Finn, 2004). To accomplish this, each branch is accountable to the other branch (Simmons, 2007; Finn, 2004). The phrases used to describe this are "separation of powers" and "checks and balances" (Ginsberg et al, 2011). For example, the judiciary checks the legislature by invalidating laws (Ginsberg et al, 2011). Similarly, the legislature checks the judiciary through the appointment process (Ginsberg et al, 2011). As a result, neither branch is completely independent from the other (Simmons, 2007; Finn, 2004). Some countries purposely designed their judiciaries to have less power than the legislature (Pasquino, 2003). In these cases, the country intentionally prevented complete judicial independence (Pasquino, 2003). Whether the institutional design includes separation of powers or specifically limits the judiciary, the democratic intent prevents complete judicial independence (Simmons, 2007; Finn, 2004; Pasquino, 2003).

A second point arguing against complete judicial independence concerns how collegial courts function (Peretti, 2002). Collegial courts, such as constitutional courts, are courts where a panel of judges decides a case rather than one individual judge (Peretti, 2002). Decisions of collegial courts reflect the position of all members (Peretti, 2002). As the judges discuss and debate the case to arrive at a decision they influence each other (Peretti, 2002). Therefore, each judge is subject to an outside influence (Peretti, 2002). No judge on a collegial court is independent from outside influence (Peretti, 2002). Any courts designed as collegial cannot, therefore, be completely independent (Peretti, 2002).

The third point against complete judicial independence involves the process of becoming a judge (Popova, 2010; Peretti, 2002). Citizens elect some judges (Popova, 2010; Peretti, 2002). These judges reflect the views and biases of the citizens who elected them (Popova, 2010; Peretti, 2002). In some cases, particularly constitutional courts, elected officials such as legislators appoint judges (Popova, 2010; Peretti, 2002). These judges share opinions and biases of the elected officials (Popova, 2010; Peretti, 2002). In either case, those responsible for putting the judge on the bench influence the judge (Popova, 2010; Peretti, 2002). This prevents complete judicial independence (Popova, 2010; Peretti, 2002).

Finally, judiciaries rely on others to enforce their decisions (Burbank and Friedman, 2002). Police, legislators, and executives ensure that judicial decisions are enforced (Burbank and Friedman, 2002). Ignoring unpopular decisions is an option available to these groups (Burbank and Friedman, 2002). The legislature and executive enforce judicial decisions regarding laws and policies (Burbank and Friedman, 2002). Enforcement of these decisions is not as obvious to the average citizen as enforcing a criminal decision (Burbank and Friedman, 2002). Thus, it is easier to ignore decisions regarding policy and law (Burbank and Friedman, 2002). Judiciaries want their decisions to be enforced (Burbank and Friedman, 2002). Consequently, they are unlikely to make unpopular decisions (Burbank and Friedman,



2002). This creates an influence on the judiciary preventing complete judicial independence (Burbank and Friedman, 2002).

### ***2.2.3 Is Complete Judicial Independence Necessary***

The final judicial independence debate concerns the necessity of judicial independence for democracy and rule of law (Popova, 2010; Staton et al, 2010; Finn, 2004; Kourlis, 2003; Burbank and Friedman, 2002; Keith, 2002). Scholars make two arguments against the need for complete judicial independence.

The first argument concerns holding courts accountable for their decisions (Finn, 2004; Burbank and Friedman, 2002). Scholars argue that limits on court actions are required to protect the democratic process (Finn, 2004; Burbank and Friedman, 2002). A completely independent court is an unchecked court (Finn, 2004; Burbank and Friedman, 2002). An unchecked court has the potential to abuse its power thus undermining the democratic process (Pasquino, 2003).

The second argument against complete judicial independence concerns the predictability associated with rule of law (Stephenson, 2006; Burbank and Friedman, 2002). Predictable laws provide guidelines for citizen behavior and the consequences for bad behavior (Stephenson, 2006; Burbank and Friedman, 2002). These scholars argue that complete judicial independence produces unpredictable decisions (Stephenson, 2006; Burbank and Friedman, 2002). These unpredictable decisions prevent a clear understanding of the law and consequences (Stephenson, 2006; Burbank and Friedman, 2002). Since rule of law depends on laws that are understood and predictable, a fully independent judiciary undermines the rule of law (Stephenson, 2006; Burbank and Friedman, 2002).

Other scholars contend that complete judicial independence is necessary for rule of law and democracy (Staton et al, 2010; Kourlis, 2003; Keith, 2002). These scholars believe only independent judiciaries make the politically difficult decisions holding governments accountable for their actions (Staton et al, 2010; Kourlis, 2003; Keith, 2002). They offer two arguments to support this point.

First, judicial independence facilitates holding other branches accountable to the rules of government (Kourlis, 2003). Judicial decisions holding the legislature accountable are more likely when there is no influence by the legislature (Kourlis, 2003). If the influence by another branch makes decisions against that branch difficult, the judiciary cannot effectively hold that branch accountable to the rules of government (Kourlis, 2003).

Second, the protection of rights needs an independent judiciary (Staton et al, 2010; Keith, 2002). Rights violations occur when the government exceeds or abuses its power (Gready and Phillips, 2009). Decisions protecting the rights of citizens are more likely when the judiciary acts without fear of retaliation (Staton et al, 2010; Keith, 2002). In addition, decisions against an abusive branch of government are unlikely if that branch is influencing the judiciary (Kourlis, 2003). Consequently, the judiciary needs to be free from both influence and retaliation to protect rights (Staton et al, 2010; Kourlis, 2003; Keith, 2002)

This debate about the necessity of judicial independence illustrates two contradictory points. First, some amount of judicial independence is necessary to ensure accountability and the protection of rights (Staton et al, 2010; Kourlis, 2003; Keith, 2002). Second, the judiciary requires accountability to ensure predictability and judicial constraint (Finn, 2004; Burbank and Friedman, 2002). The next section presents a resolution to this contradiction within the judicial independence debate.

#### **2.2.4 A Middle Ground**

To answer the research question acceptance of two points from the above debate is necessary. Most importantly, the protection of rights requires some level of judicial independence (Staton et al, 2010; Howard and Carey, 2004; Keith, 2002). For example, Howard and Carey (2004) prove that *de facto* judicial independence correlates with the protection of civil and political rights. Although personal bias influences judges in their policy choices, it does not prevent judges from ruling that another branch is violating rights (Segal and Spaeth, 2002). The influence of personal bias can produce decisions that

increase the protection of rights (Segal and Spaeth, 2002). For example, a constitutional court judge may have a personal bias in favor of social justice (Segal and Spaeth, 2002). As a result, the judge adjudicates increased protections for social rights (Segal and Spaeth, 2002). Thus, judiciaries protect rights at a level of independence below complete independence.

Furthermore, democratic governments limit judicial independence (Finn, 2004). An intentional design feature of democratic governments separates the powers of government among different branches (Federalist 47). This design forces branches to cooperate with each other to achieve policy goals (Mesonis, 2008; Finn, 2004). In addition, it allows branches to check any abuse of power by another branch (Mesonis, 2008). The judiciary is one of the government branches included in this design (Ginsberg et al, 2011). As such, judiciaries are subject to separation of powers and checks and balances (Ginsberg et al, 2011). Thus, democracies intentionally construct the judiciary to have a level of independence less than complete independence (Finn, 2004).

Therefore, the position in the judicial independence debate taken here is that a completely independent judiciary (i.e. one that is free from both the influence of other branches and personal bias) is neither necessary nor desirable for democracy and the protection of rights (Simmons, 2007; Finn, 2004). Two qualifications acknowledge the use of this position in the judicial independence debate. First is the use of the term “autonomous” judiciary as opposed to “independent” judiciary. As used here, the definition of an autonomous judiciary combines the features advanced by Staton et al (2010), Rios-Figueroa and Staton (2009), and Finn (2004). An autonomous judiciary makes decisions without influence by other branches and has the ability to enforce those decisions (Staton et al, 2010, Rios-Figueroa and Staton, 2009; Finn, 2004).

The second qualification is a distinction between constitutional courts and other national courts such as local, appellate, and civil courts. There are two reasons for this distinction. First, a nation’s

constitution defines the powers, composition, and jurisdiction of the constitutional court.<sup>12</sup> This definition of constitutional courts is separate from the definition of other national courts.<sup>13</sup>

Constitutions also place the constitutional court outside the hierarchy of other national courts.<sup>14</sup>

Second, because of their definition in the constitution and specific jurisdiction, constitutional courts are both political actors and policymakers (Comella, 2004; Burbank, Friedman, and Goldberg, 2002; Lee, Knight, and Shvetsova, 2001). Since they have a policy role, constitutional courts challenge the traditional democratic separation of powers between the judiciary and legislature. Since the constitutional court is an unelected body,<sup>15</sup> it also challenges majoritarian principles. Despite challenging democracy, post-communist European countries adopted constitutional courts to protect democracy (Albi, 2009). Therefore, constitutional courts have a unique position in democratic governments, one that prevents complete independence.

In summary, an autonomous constitutional court makes enforceable decisions without influence from other branches. Since membership on constitutional courts is by appointment rather than elections, personal bias of the members is similar to the appointing bodies (Popova, 2010; Solyom, 2003; Peretti, 2002). This does not mean that the appointing body influences constitutional court decisions. Therefore, the design of constitutional courts prevents complete independence (Staton et al, 2010; Rios-Figueroa and Staton, 2009) but not its autonomy as defined here. The next section discusses autonomy and its application to both the judiciary and legislature.

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<sup>12</sup> As examples across a broad spectrum of countries see the Constitution of Cambodia; Constitution of Croatia; Constitution of Czech Republic; Constitution of Poland; Constitution of Romania; Constitution of Slovakia, Constitution of South Africa; German Basic Law; New Fundamental Law of Hungary.

<sup>13</sup> As examples across a broad spectrum of countries see the Constitution of Cambodia; Constitution of Croatia; Constitution of Czech Republic; Constitution of Poland; Constitution of Romania; Constitution of Slovakia, Constitution of South Africa; German Basic Law; New Fundamental Law of Hungary.

<sup>14</sup> Please refer to the European Judicial Network at [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/org_justice/org_justice_gen_en.htm)

<sup>15</sup> As examples across a broad spectrum of countries see the Constitution of Cambodia; Constitution of Croatia; Constitution of Czech Republic; Constitution of Poland; Constitution of Romania; Constitution of Slovakia, Constitution of South Africa; German Basic Law; New Fundamental Law of Hungary.

*Judicial Autonomy, Legislative Autonomy and Limitations*

This definition of constitutional court autonomy allows comparison to Fish and Kroenig's (2009) measure of legislative autonomy. In their survey of legislative power, Fish and Kroenig (2009) determine legislative autonomy based on nine items. These nine items assess the extent to which the legislature is able to act without interference from other areas, or branches, of government (Fish and Kroenig, 2009). This includes freedom of the legislature to set its own agenda and to act on that agenda (Fish and Kroenig, 2009).

As an understanding of limitations on judicial independence was important, so is an understanding of limitations on autonomy. Limitation of an institution's autonomy occurs for two reasons, one seen as positive, and one seen as negative. First, one institution will limit another institution's autonomy to exert influence over, or control the actions of, the institution (O'Donnell, 2003). This occurs when one institution sees another as an impeding their goals (O'Donnell, 2003). For example, the executive limited the autonomy of the Russian Constitutional Court in response to unfavorable decisions (Schwartz, 1998). This is a negative limitation on autonomy because it is not according to established law (Schwartz, 1998).

In addition, as mentioned above, measures to hold an institution accountable, or check their actions, limit institutional autonomy (Kenney, 2003; O'Donnell, 2003). This type of limitation is legal (O'Donnell, 2003). It protects both democracy and rights (O'Donnell, 2003). For example, constitutional courts were encouraged in post-communist countries to protect the developing democracies from backsliding to authoritarianism (Solyom, 2003). The establishment of constitutional courts was a check on the abuse of power by the other branches of government (Solyom, 2003). Constitutional courts check the abuse of power when they review the constitutionality of laws and actions (Vanberg, 2001). This is a positive limitation on autonomy because it is according to established law.

In their measurement of legislative autonomy, Fish and Kroenig (2009) do not consider whether a limitation to autonomy is positive or negative. For example, they consider judicial review a limitation to the legislature's autonomy (Fish and Kroenig, 2009). Judicial review might be a legally defined effort by the constitutional court to hold the legislature to the rules, including human rights, established in the constitution (Emmert, 2009; Carruba et al, 2008). Conversely, judicial review might be an effort by the judiciary to establish, extend, or modify policy according to the judiciary's preferences (Vanberg, 1998). This judicial review is beyond the legally established powers of the judiciary (Colon, 2003; Freejon and Wiengast, 1991). Therefore, Fish and Kroenig (2009) view a valid check against the legislature in the same way as a usurpation of power by another branch.

### **2.2.5 *Judiciary in Authoritarian Regimes***

Because the post-communist countries of Central Eastern Europe transitioned from authoritarian to democratic governments, it is worth considering the politics of the judiciary in authoritarian governments. This literature presents two noteworthy aspects to courts in authoritarian regimes; a typology of the courts (Solomon, 2007) and relationship between the courts and the authoritarian regime (Moustafa, 2008; Hilbink, 2007; Pereira, 2003).

Solomon (2007) argues that courts in authoritarian regimes fall into four categories. In the first category courts are politically dependent on the regime (Solomon, 2007). The regime controls the judiciary through regular performance evaluations and legislation by the regime and its political party (Solomon, 2007). Although the judiciary in this category lacks both *de jure* and *de facto* independence it is stable (Solomon, 2007). In the second category the judiciary is fragmented across courts and tribunals (Solomon, 2007). The ordinary judiciary has *de jure* independence although the regime limits its *de facto* independence through evaluations and a judicial bureaucracy designed to encourage decisions that support the regime without outside influence (Solomon, 2007). In addition, the authoritarian regime uses special courts or tribunals for cases that are politically sensitive (Solomon,

2007). As with the previous category, judiciaries are stable but lack independence (Solomon, 2007).

Judiciaries in the third category are more independent and more strategic (Solomon, 2007).

Authoritarian regimes endow these courts with politically meaningful jurisdiction which is removed should the court rule against regime interests (Solomon, 2007). However, due to the threat of retaliation, the judiciary self-censors thus limiting its own *de facto* independence (Solomon, 2007). The constant and real threat of retaliation also makes judiciaries in this category unstable (Solomon, 2007). Finally, judiciaries may have *de jure* independence and be free of threats of retaliation by the authoritarian regime yet choose to protect regime interests (Solomon, 2007). While these judiciaries give the perception that they are independent and impartial, in reality they act as though they are controlled by the authoritarian regime (Solomon, 2007). The difference between perception and reality results in a lack of confidence in the judiciary and a loss of judicial legitimacy (Solomon, 2007). Although Solomon (2007) applied these categories to authoritarian regimes they are also applicable to democracies, particularly weak or unconsolidated democracies. For example, the Russian Constitutional Court rules strategically to prevent further reduction of their jurisdiction (Schwartz, 1998).

Underlying each of these categories, and attempting to explain why authoritarian regimes tolerate any judicial independence, are theories about the relationship between judicial power and authoritarian regimes (Moustafa, 2008; Hilbink, 2007; Pereira, 2003). Pereira (2003) posits that the independence and power accorded the judiciary in authoritarian regimes depends on the past relationship between the courts and the military. When the military has a history of working with and within the judicial system, the subsequent authoritarian regime continues to use the courts and they have some measure of power and independence (Pereira, 2003). However, if the military historically worked outside the ordinary judicial or views the ordinary judicial system as weak the authoritarian regime continues to work outside the ordinary courts (Pereira, 2003). Moustafa (2008) views the relationship between the judiciary and authoritarian regime through the lens of rational choice. Based

on a case study of Egypt, he argues that authoritarian regimes value the judiciary for financial reasons (Moustafa, 2008). An effective and relatively independent judiciary provides the legal protections necessary to attract foreign business and investment (Moustafa, 2008). However, this comes with the risk that human rights advocates will also use the courts against the regime (Moustafa, 2008). Should this happen the regime minimizes its risk by either altering the composition of the court to ensure its interests are protected or limiting access to the court (Moustafa, 2008). To prevent the risk of an activist court, regimes can use international arbitration to encourage financial investment while limiting the independence of national courts (Massoud, 2014). Also, this is consistent with research arguing that governments prioritize economic prosperity over human rights (Evans, 2001). Hilbink (2007) argues that the history of judicial ideology prior to the authoritarian regime shapes the relationship between the two institutions. Based on a study of the Chilean courts, she argues that courts in the civil law tradition with a history of distancing themselves from politics self-censor under authoritarian regimes (Hilbink, 2007). This is consistent with research finding that judges trained under communism are hesitant to overturn legislation (Tanasescu, 2012). This can also be seen in democracies such as England's where courts are hesitant to challenge parliament's supremacy (Carnwath, 2004). China illustrates the reciprocal relationship between courts and other aspects of the authoritarian regime (Stockmann and Gallagher, 2011). China's state controlled media encourages use of the courts by reporting positive aspects and outcomes (Stockmann and Gallagher, 2011). Because the media presents a perspective that the courts protect worker's rights, and because the authoritarian state prevents alternate reports, citizens believe in the legitimacy of the courts (Stockmann and Gallagher, 2011).

Transitioning from an authoritarian government requires changes to the judicial system. The judicial system is seen as crucial to the transition process because of its ability to hold the new government to the new 'rules of the game' (Dallara, 2007). During this process the press also plays an important role in educating citizens about the reformed legal system (Association of the Bar of the City



of New York, 1965). Judicial history plays a role in this process as well because research shows that the success of the reforms depends on the position of the judiciary during the authoritarian regime (Pereira, 2003)

## **2.3 Constitutional Court, Legislative, and Supranational Interactions**

As previously mentioned, institutional interactions influence institutional autonomy (Simmons, 2007; Finn, 2004). Research on these interactions focuses on four types of institutional interactions: constitutional design, benefits derived from constitutional courts, and interactions with parties and interest groups.

### **2.3.1 Constitutional Design**

Constitutions establish the legal parameters, institutional design, and political culture for a society (Pruess, 1991). Consequently, some researchers study the constitutional design of institutions and the resulting impact on the balance of power between branches of government (Medes, 2011; Elkins et al, 2010; Krasner, 2005; Magalhaes, 2003). The constitution contains rules that shape the balance of power, relationship, and interactions between the constitutional court and legislature (Elkins et al, 2010).

However, some constitutional designs blur the lines between the legislature and judiciary (Colon, 2003). This occurs when the judiciary, usually the constitutional court, involves itself in the policy process (Colon, 2003). An example occurs in Hungary where constitutional court decisions have both economic and political impacts (Pataki, 1991). Two factors combine to provide the constitutional court multiple openings into the policy process (Pataki, 1991). First, the Hungarian constitution provides the constitutional court with multiple opportunities to review laws (Pataki, 1991). Second, the Hungarian constitution lacks clarity (Pataki, 1991). As Hungary's constitutional court takes advantage of

these constitutional design openings into policy, it further blurs the boundaries with legislature (Colon, 2003; Pataki, 1991).

The relationship between the legislature and constitutional court established in the constitution is not always static. A change to the constitutionally established relationship occurs in three ways. First, interactions between constitutional courts and legislatures alter the structure of power within the government established by the constitution (Huster, 2003; Wiegandt, 1997; Pehe, 1991). As constitutional courts review laws, they can define the duties of the legislature in their decisions (Huster, 2003; Wiegandt, 1997). Germany provides an example of this behavior (Huster, 2003). While reviewing the constitutionality of a law the German Constitutional Court defined the legislature's duties to monitor the effects of their regulations (Huster, 2003). This decision established duties for the legislature that are not included in the German constitution (Huster, 2003). It resulted in a perception that the German Constitutional Court is adjudicating its view of legislative responsibilities (Wiegandt, 1997). The increased ability to monitor regulations gave the legislature an increased ability to enforce their desired outcomes (Huster, 2003). Thus, an interaction between the constitutional court and legislature increased legislative autonomy (Staton, 2010; Cameron, 2002).

Second, events within the country can complicate or alter the relationship between constitutional courts and legislatures (Krasner, 2005; Magalhaes, 2003). For example, coalitions within the legislature complicate the pre-established interactions (Krasner, 2005). A study of abstract review by the constitutional courts of Spain and Portugal illustrates this point (Magalhaes, 2003). In this study, judges remained responsive to legislative majorities unless they were safe from retaliation (Magalhaes, 2003). In other words, fear of action by the legislature altered its relationship with the constitutional court (Magalhaes, 2003).

Finally, legislatures strategically use the dispute resolution capability of the constitutional court to alter the balance of power between the two branches (Pehe, 1991). This occurred in the Czech

Republic (Pehe, 1991). The Czech Parliament created the constitutional court to increase checks and balances within the government and settle disputes between bodies of government (Pehe, 1991). It gave up some autonomy to the constitutional court by giving the court the power of judicial review (Pehe, 1991). This was a strategic action because it allows the legislature to protect its autonomy in relation to the executive (Pehe, 1991).

In summary, the national constitution establishes the initial relationship between constitutional courts and legislatures (Elkins et al, 2010). However, interactions between constitutional courts and legislatures alter their relationship as well as the balance of power between the two institutions (Krasner, 2005; Huster, 2003; Magalhaes, 2003; Pehe, 1991). The next section reviews the benefits legislatures derive from constitutional courts.

### **2.3.2 *Constitutional Court Benefits***

A second area of research on constitutional court and legislative interactions focuses on the benefits legislatures derive from constitutional courts (Hunt, 2003; Peabody, 2001; Landfried, 1994; Stone, 1990). Legislatures value constitutional courts for strategic (Landfried, 1994; Stone, 1990) and policy (Matthews, 2005; Santoni and Zucchini, 2004; Carbonell, 2003) reasons.

By strategically bringing cases before the constitutional court, a group of legislators moves a political debate from the legislature to the constitutional courtroom, from the political to the legal (Hunt, 2003; Vanberg, 1998; Landfried, 1994; Stone, 1990). For example, if a minority group cannot defeat a law in the legislature they can challenge the constitutionality of the law in the constitutional court (Landfried, 1994; Stone, 1990). Sometimes legislators pass bad laws for electoral reasons (Peabody, 2001). The constitutional court can subsequently find the law unconstitutional without electoral cost for the legislators (Peabody, 2001). Electoral impunity offsets any loss of autonomy experienced by the legislature (Hunt, 2003; Peabody, 2001; Landfried, 1994; Stone, 1990).

The need to maintain policy status quo also shapes interactions between the constitutional court and legislature (Matthews, 2005; Santoni and Zucchini, 2004; Carbonell, 2003). Italy provides an example. The Italian Constitutional Court can stop or alter policy objectives of the Italian Parliament (Santoni and Zucchini, 2004). When the party composition of the Italian Parliament discourages significant policy change, it allows the Constitutional Court more autonomy (Santoni and Zucchini, 2004). Without significant legislation to review, the constitutional court poses no threat to the objectives of the Parliament (Santoni and Zucchini, 2004). However, when the composition of the Italian Parliament makes change possible, the Constitutional Court poses a threat to the Parliament because it could overturn policy (Santoni and Zucchini, 2004). Under these circumstances, the Italian Parliament undertakes efforts to limit the autonomy of the Constitutional Court (Santoni and Zucchini, 2004).

Sometimes constitutional courts and legislatures must work together to achieve policy goals, particularly social issues (Matthews, 2005). Carbonell (2003) shows that policy success depends on the relative strength of the legislature compared to the court. When the balance of power between the two institutions discourages cooperation, legal remedies for social issues are ineffective (Carbonell, 2003). In these cases, the legislature is willing to sacrifice autonomy for a desired social policy outcome (Matthews, 2005; Carbonell, 2003).

As this discussion illustrates, the legislature uses the constitutional court to help achieve policy goals (Matthews, 2005; Carbonell, 2003; Solyom 2003; Shipan 2000) and avoid political costs associated with policies ((Hunt, 2003; Alter, 1998; Vanberg, 1998; Landfried, 1994; Stone, 1990). Since parties and interest groups attempt to influence both legislatures and courts ((Helms, 2006; Navia and Rios-Figueroa, 2005; Alter, 1998), the next section discusses the interactions between these groups.

### **2.3.3 *Parties and Interest Groups***

The final area of research concerns interactions between parties, interest groups, constitutional courts, and legislatures (Helms, 2006; Navia and Rios-Figueroa, 2005; Alter, 1998). Political parties

interact with constitutional courts and legislatures through the policymaking function of the legislature (Alter, 1998; Vanberg, 1998; Landfried, 1994; Stone, 1990). These interactions can take two forms.

First, political parties use the constitutional to prevent electoral repercussions (Alter, 1998; Vanberg, 1998). Political parties are sensitive to elections (Alter, 1998). Conversely, constitutional courts operate without regard to electoral schedules (Alter, 1998). Therefore, it is unlikely that the electorate will penalize political parties when the constitutional court declares a law unconstitutional (Alter, 1998). By the time, the constitutional court makes its decision the electorate will no longer associate the political party with the law (Alter, 1998). This allows the political party to pass policy through the legislature while deferring constitutional issues to the constitutional court (Alter, 1998).

A second type of interaction involves the use of the constitutional court by minority parties to achieve their agendas despite the legislature (Vanberg, 1998; Landfried, 1994; Stone, 1990). In Europe, the use of constitutional courts increased as bipolarization of party politics increased (Helms, 2006). Parties that were in the minority in the legislature turned to constitutional courts when they were unsuccessful on the floor of the legislature (Helms, 2006). However, use of the constitutional court to achieve party goals comes with a risk (Miller, 1993). A constitutional court victory by a minority party might be framed as a political loss for a majority party or majority coalition (Miller, 1993).

Similarly, minorities and interest groups use constitutional courts to protect their rights from legislative actions (Navia and Rios-Figueroa, 2005; Alter, 1998; Landfried, 1994; Miller, 1993; Garber, 1992). By using the constitutional court, minorities and interest groups change the argument from political to legal and increase their chances of success (Navia and Rios-Figueroa, 2005). In these cases, interest groups and minorities shape the interaction between constitutional courts and legislatures by instigating the legal challenge (Navia and Rios-Figueroa, 2005; Alter, 1998; Landfried, 1994; Miller, 1993; Garber 1992).

These research efforts explain the importance of institutional design and the behaviors of the institutions. Not addressed is whether interactions strengthen or weaken the national legislature. Nor does this research address the impact of these interactions on human rights. However, before exploring the impact of these interactions on human rights it is important to understand the relationship between constitutional courts and international human rights laws and norms. The next section discusses the research on human rights and constitutional courts.

## **2.4 Constitutional Courts and International Human Rights**

Constitutional courts are in a position to use international human rights laws and norms to protect human rights at the national level (Waters, 2007; Schimmelfennig, 2006). Research examines the relationship between constitutional courts and international human rights laws and norms in two ways (Waters, 2007; Schimmelfennig, 2006). First, research focuses on legal interpretation (Waters, 2007). This research argues that the use of international human rights law by national courts is evidence of “creeping monism” (Waters, 2007). National courts interpret international law in one of two ways (Waters, 2007). A monistic view treats international law as part of national law (Waters, 2007). Conversely, a dualist view treats international law as separate from national law (Waters, 2007). Dualists require incorporation, or legislative enactment, of international laws into national law (Waters, 2007). “Creeping monism” argues that courts in common law countries are moving away from the dualist view of international law (Waters, 2007). As a result, constitutional courts that follow a monistic view of international law afford citizens international human rights protections without legislative actions (Waters, 2007).

Waters’ (2007) work follows the judicial legitimacy (Gubbay, 1997; Caldeira and Gibson, 1995; Gibson, Caldeira, Baird, 1998) and perceived judicial role (Maveety and Grosskopf, 2004) research when explaining why judges choose to include international laws and norms in their decisions. Judges cite international laws and norms in their decisions to increase the legitimacy and political acceptance of

their interpretation of domestic legal texts (Waters, 2007). Furthermore, judges see themselves involved in discussion with judges in other countries (Slaughter, 2010; Waters, 2007; Barak-Erez, 2004; Slaughter, 2003). Their decisions use international human rights law and norms to further the discussions (Slaughter, 2010; Waters, 2007; Barak-Erez, 2004; Slaughter, 2003). When constitutional court judges choose to use international law, their decisions force an international perspective on the national legislature (Slaughter, 2010; Waters, 2007; Slaughter, 2003).

Second, research examines constitutional court use of international law to strategically protect or increase their position of authority vis-à-vis other institutions (Schimmelfennig, 2006; Schmidt, 2005; Maveety and Grosskopf, 2004; Solyom, 2003; Nichol, 1999; Rodin, 1999; Schwartz, 1998; Jacob et al, 1996). Constitutional courts strategically build legitimacy and jurisdiction by demonstrating their ability to provide a higher level of protection of rights than other courts (Schimmelfennig, 2006). This includes using international human rights law as justification for judicial review (Peters, 2009). When a case arguing violation of a constitutional right comes before the constitutional court, they have the opportunity to protect rights through their interpretation of the national constitution (Schimmelfennig, 2006). In these cases, the decisions of constitutional courts refer to international human rights and norms to broaden the interpretation of constitutionally defined rights (Schimmelfennig, 2006). For example, in both South Africa (Pieterse, 2004) and Germany (Feinberg, 2005) the constitutional courts overturned politically popular laws to protect human rights. In these cases, the constitutional courts based their interpretation of rights on evolving international human rights laws and norms (Heywood, 2009; Gubbay, 1997). Research demonstrates that constitutional courts use international laws and norms to support claims by both civic (Ssenyonjo, 2007) and political (Ozel, 2008) groups. In other words, cases brought by civic or political groups allow the constitutional court to use international law to expand rights while increasing their legitimacy (Peters, 2009; Ozel, 2008; Ssenyonjo, 2007; Schimmelfennig, 2006).

In addition to the interactions between constitutional courts and international human rights law, research considers the context of the interactions (Alter, 2009; Claes, 2007; Jacobsohn, 2006; McCann, 2006). Constitutional courts are both legal and political institutions (Staton et al, 2010; Finn, 2004; Lee, Knight, and Shvetsova, 2001). As such, legal arguments concerning constitutional courts must be sensitive to the political context (Alter, 2009; Claes, 2007; Jacobsohn, 2006). Political context affects the use of national and international sources in court decisions (Alter, 2009; Claes, 2007; Jacobsohn, 2006). In addition, the political context affects the relationship between the constitutional court and legislature (Vanberg, 2001). Legal arguments concerning constitutional courts must be sensitive to the legal culture as well (McCann, 2006). Both political context and legal culture vary within and across countries (McCann, 2006).

As this illustrates existing research indicates ways in which constitutional courts use international human rights law (Peters, 2009; Ozel, 2008; Ssenyonjo, 2007; Waters, 2007; Schimmelfennig, 2006). It also indicates the importance of both legal and political context (Alter, 2009; Claes, 2007; Jacobsohn, 2006; McCann, 2006). However, existing research does not consider the political and legal context of constitutional court use of international human rights law.

To understand the political and legal context in which constitutional courts work requires consideration of the European Union influences. The next section addresses this topic.

## **2.5 European Union Factors Impacting Autonomy**

Constitutional courts and legislatures in European Union member countries operate under the influence of the European Union legal system (Alter, 1998, Volcansek, 1990, 1989). Existing research examines interactions between supranational courts, such as the European Court of Justice (ECJ), on national courts and legislatures (Maveety and Grosskopf, 2004; Tsebelis and Garrett, 2001; Alter, 1998,



Volcansek, 1990, 1989).<sup>16</sup> Some researchers focus on the relationship between ECJ decisions and European Union integration (Carruba, 2003; Rasmussen, 1986). They argue the ECJ promotes unification when popular unification efforts stall (Rasmussen, 1986). This is possible because the ECJ holds member countries to EU law (Carruba, 2003). For example, a decision of the ECJ established EU law as transnational and directly applicable to member states (Eleftheriadis, 1998). The ECJ encourages enforcement of its decisions by enlisting the assistance of national courts (Eleftheriadis, 1998). By making EU law directly applicable to member states the ECJ encourages national courts to enforce both its decisions and EU law (Eleftheriadis, 1998).

Other researchers argue that the ECJ established itself in the hierarchical role of a supranational constitutional court (McCown, 2003; Alter, 1998; Eleftheriadis, 1998, Garrett et al 1998; Volcansek, 1990, 1989). The ECJ did this by giving EU treaties and laws the status of a constitution superior to national laws (McCown, 2003; Alter, 1998; Eleftheriadis, 1998, Garrett et al 1998; Volcansek, 1990, 1989).

Despite arguments that the influence of the ECJ is not always consistent (Tsebelis and Garrett, 2001), evidence indicates that it complicates the balance of power between national institutions (Georgopoulos, 2003). For example, the Croatian Constitutional Court is bound to enforce national treaties and has the power to strike inconsistent legislation (Rodin, 1999). As a result, the Croatian Constitutional Court has the potential to limit both legislative and executive policy initiatives (Rodin, 1999).

Complications between national institutions occur in the more established Western European countries as well (Schmidt, 2005; Nichol, 1999; Jacob et al, 1996). In England, courts can now challenge acts of Parliament thus changing the relationship between the courts and Parliament (Nichol, 1999). In

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<sup>16</sup> Additional research efforts are included in this section: Krikorian, 2005; Schmidt, 2005; Carruba, 2003; Georgopoulos, 2003; McCown, 2003; Nichol, 1999; Rodin, 1999; Garrett et al 1998; Eleftheriadis, 1998; Jacob et al, 1996; Rasmussen, 1986.

the past, acts of Parliament were considered the supreme law of the land and unchallengeable by courts (Nichol, 1999). Similarly, in France, the constitution establishes an extremely limited role for the Constitutional Council (the French constitutional court) (Schmidt, 2005; Jacob et al, 1996). However, the Constitutional Council adjudicates broadly in matters associated with the European Union (Schmidt, 2005; Jacob et al, 1996).

Yet this does not mean that national courts give the ECJ carte blanche (Kwiecien, 2005; Rodin, 1999). National courts remain reluctant to recognize the supremacy of supranational laws when they are not consistent with the national constitution (Kwiecien, 2005; Rodin, 1999). One explanation offered is that supranational national courts to educate the national legislature on international norms (Maveety and Grosskopf, 2004).

This research creates two opposing theories about the influence of the ECJ on national courts (Schimmelfennig, 2006; Alter, 2001; Conant, 2001). Alter argues that the ECJ empowered individuals and national judges to overturn national policies (Alter, 2001). Conant (2001) builds on this argument emphasizing that the ECJ empowered lower national courts over the higher national courts by limiting the ability of the higher court so overturn lower court ruling. Furthermore, Conant (2001) points out that the national constitutional courts have the most to lose and least to gain from EU legal integration. Therefore, they will be less likely to use ECJ case law to foster changes in national policy (Conant, 2001).

This contrasts with Schimmelfennig's (2006) view. Schimmelfennig (2006) argues that national constitutional courts use the empowerment by the ECJ strategically. By using EU laws, constitutional courts interpret national constitutional rights more broadly (Schimmelfennig, 2006). This allows them to increase the protection of rights as well as their power vis-à-vis other national courts (Schimmelfennig, 2006),

EU influence on the balance of power between the branches of government is not limited to the judiciary (Rizzuto, 2004; Capano and Giuliani, 2003; Capano and Giuliani, 2003). There is evidence in

Western European countries that the role of national legislatures is strengthened because they have the power to delay or block EU measures (Rizzuto, 2004; Capano and Giuliani, 2003; Capano and Giuliani, 2003). An example is the French Parliament (Rizzuto, 2004). The French Parliament used integration into the European Union to justify passing legislation that increased its powers to review government actions (Rizzuto, 2004). This legislation gave the French Parliament the ability to block or delay EU actions (Rizzuto, 2004). Similarly, an analysis of the Italian Parliament showed that the laws it drafted to accomplish integration with the European Union redefined its duties (Capano and Giuliani, 2003). As a result, the Italian Parliament increased its role in policy (Capano and Giuliani, 2003).

Evidence suggests that political institutions, and their relationships, might be subject to different influences in the developing democracies of post-communist Europe versus the established democracies of Western Europe (Raik, 2004; Rizzuto, 2004; Schimmelfennig, 2004; Sissenich, 2004; Beichelt, 2003; Pigenko, 2001; Oquaye, 2000; Sajo, 1995). As newly democratic institutions develop, experiences with institutional rules shape legislative attitudes (Pigenko, 2001). The EU influenced institutional rules in post-communist countries through support they provided to these countries (Raik, 2004; Rizzuto, 2004; Schimmelfennig, 2004; Sissenich, 2004; Beichelt, 2003). In some countries the EU influence is negative (Raik, 2004; Rizzuto, 2004; Schimmelfennig, 2004; Sissenich, 2004; Beichelt, 2003). For example, the EU integration process in Estonia limited political participation to elites focused on a speedy accession (Raik, 2004). A study of EU policy adoption in Poland and Hungary found that the EU focus on state building without social learning resulted in a technocratic government and caused EU rule adoption to be problematic (Sissenich, 2004). One explanation offered for this is that the EU focused on structural changes without changing the underlying society or culture (Emmert, 2009). Another study found that the EU contributed to the consolidation of democracy but at the expense of political competition (Schimmelfennig, 2004). Several studies found that the EU participation is tilting the executive/legislative balance of power toward the executive thus weakening the legislature (Rizzuto,

2004; Schimmelfennig, 2004; Beichelt, 2003). This change results from the creation of additional parties such as anti-EU parties (Rizzuto, 2004; Schimmelfennig, 2004; Beichelt, 2003).

These research efforts fail to address the supranational impact on the autonomy of the institutions and the consolidation of democracy. For example, existing research does not address whether a constitutional court empowered by the European Court of Justice can offset the weaknesses imposed on the national legislature by the European Union.

## **2.6 Supranational and National Legal Impacts on Legislatures**

Five strains of existing research offer insight into the weaknesses presented above. First, Schimmelfennig (2006) demonstrated that national constitutional courts use the protection of human rights to establish and defend their jurisdiction. This research demonstrates that constitutional courts build human rights rhetoric defending their policy preferences into the legal reasoning of their decisions (Schimmelfennig, 2006). This is important to the research question because it provides insight into how and why constitutional courts expand their autonomy. Further, it provides insight into why legislatures are willing to accept increased constitutional court autonomy.

Second, Maveety and Grosskopf (2004) demonstrated that constitutional courts operate at both the national and international level. This allows constitutional courts to facilitate democratic reform by identifying ways to incorporate internationally expected, but nationally unpopular, reforms into national legislation (Maveety and Grosskopf, 2004). This research is consistent with Schimmelfennig's work because it sees constitutional courts as expanding their autonomy through international law (Schimmelfennig, 2006; Maveety and Grosskopf, 2004). It addresses how constitutional courts could increase the protection of human rights, even when some of these rights (such as minority rights) are nationally unpopular.

Third, Stone (1990) demonstrated that national constitutional courts altered the legislative process through past and present decisions as well as the threat of constitutional court review. Abstract

review effectively facilitated this change (Stone, 1990). Stone's research is applicable to the research question because it illustrates how constitutional courts can increase their autonomy in relation to legislatures. As legislatures increasingly consider constitutional courts while they create legislation, their autonomy in relation to constitutional courts decreases.

Fourth, Finnemore's (2003) work on changes in patterns of military intervention provides insight on the interaction of national constitutional courts and legislatures. Finnemore argues that the increased legalization of issues, increased norms of human rights and equality, and changes in values held by the states explain changes in the patterns of military intervention (Finnemore, 2003). Military intervention decreased as legal resolution of disputes increased (Finnemore, 2003). This research addresses how opportunities for constitutional courts to increase their autonomy occur. As parliamentarians learn to use constitutional courts and international law to alter legislative action, they change the legislative patterns. Legislative policy losers begin framing debates in legal and human rights terms so they are appropriate for the constitutional court.

Finally, Fish and Kroenig (2009) developed a measure of legislative autonomy. A similar methodology can create a measure of constitutional court autonomy. The two measures facilitate comparison across countries. A quantitative use of these measures can assess the relationship between legislative and constitutional court autonomy and the protection of human rights.

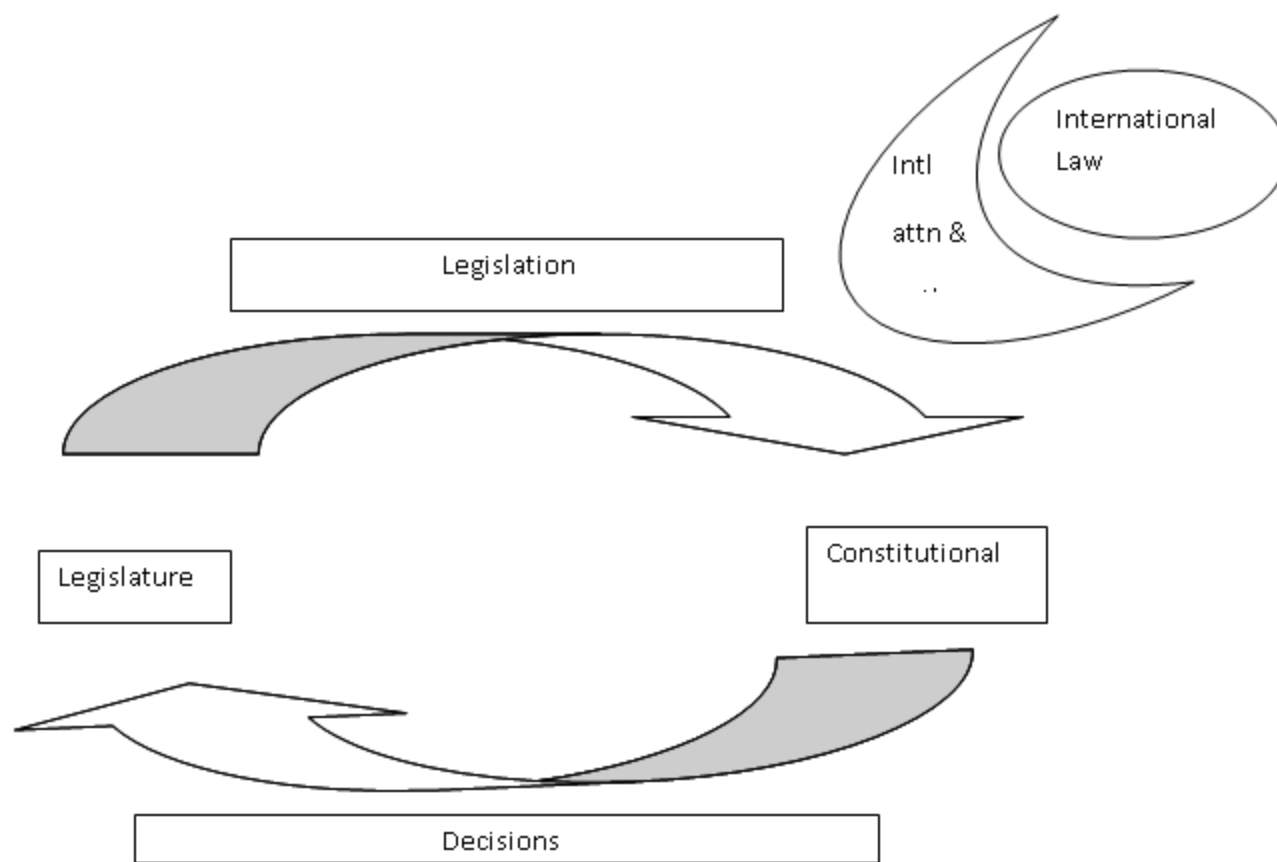
Figure 2.1 illustrates the effect of combining these research efforts to address the research question. Legislatures produce laws. Constitutional courts review these laws. While reviewing the law the constitutional court can choose to use international law, particularly international human rights law. International attention (for example, pre-accession review by the European Union) and national interest influence the constitutional court's decision on the use of international law. The constitutional court's decision influences current and future legislation. As this cycle is repeated the constitutional court gains autonomy by increasing its jurisdiction over legislative acts. Since the legislature must consider the

constitutional court when constructing and debating legislation, there is a reduction in legislative autonomy.

Figure 2.1 also illustrates the argument, presented here, that national constitutional courts reduce national legislative autonomy as they protect human rights and democracy. A measure of constitutional court autonomy created following the methodology of Fish and Kroenig (2009) allows testing of this argument.<sup>17</sup> Finnemore's argument sets the expectation that the constitutional court's impact on legislative autonomy increases over time. Finnemore, Stone, and Maveety and Grosskopf's research efforts lead to an expectation that international human rights arguments before the constitutional court increased the impact on the legislature's autonomy. The next section presents hypotheses built on these research efforts.

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<sup>17</sup> Fish and Kroenig's Handbook of National Legislatures compared attributes of national legislatures across a wide range of countries. This comparison includes survey results received from three national legislative experts in each country. Questions solicited information on the structure and actions of the legislature and the independence of the legislature from other branches of government.



**Figure 2.1 Constitutional Court Interactions**

## 2.7 Hypotheses

Three hypotheses derive from the five research efforts described immediately above.

*Increasing constitutional court autonomy increases the protection of human rights.* This hypothesis follows from the arguments of Schimmelfennig, Stone, and Maveety and Grosskopf. It tests whether the constitutional court uses human rights to protect its niche by looking at the role of institutional autonomy. It tests the impact of constitutional courts on legislative autonomy. It also tests whether or not that impact has an effect on the protection of human rights. This requires the development of a measurement of constitutional court autonomy following the methodology used by Fish and Kroenig (2009) in their evaluation of national legislatures. Acceptance of this hypothesis

requires demonstration that both constitutional court autonomy and protection of human rights increase.

*As supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures* This hypothesis builds on a combination of Stone (1990) and Finnemore's (2003) research. It evaluates the ability of supranational legal institutions to alter the interaction between national constitutional courts and legislatures. Current research posits that constitutional courts increase their autonomy because of supranational factors, such as the use of international human rights law (Waters, 2007; Schimmelfennig, 2006) or empowerment by supranational courts (Schimmelfennig, 2006; Alter, 2001; Conant, 2001). This hypothesis extends that research to examine how constitutional courts alter behavior within the country. Acceptance of this hypothesis requires demonstration of supranational (either regional or international in origin) constraints in the forms of laws and/or norms used by national constitutional courts to constrain the actions of the national legislation. This requires comparing the interactions of constitutional courts and national legislatures across time and countries with varying levels of supranational constraints (such as regional and international monitoring or regional and international legal action).

*Constitutional courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral.* The third hypothesis looks at the ability of international law to further the national protection of human rights and democracy. It builds on Finnemore's (2003) belief in the power of international human rights law to legalize political debates. This hypothesis is important because it will contribute to the understanding of what factors contribute to the ability of constitutional courts to protect human rights and democracy. It improves our understanding of why legislatures would be willing to accept the constraining decisions of constitutional courts. Acceptance of this hypothesis



requires evidence that constitutional courts in a country that experienced a negotiated transition are more likely to use international human rights law in their decision.

## **2.8 Conclusion**

This chapter began with four objectives. First, it presented the current debates surrounding judicial independence and its relationship to judicial autonomy. The definition of judicial autonomy used here is a judiciary that makes decisions without influence by other branches and can enforce those decisions. This definition allows a comparison of judicial autonomy with Fish and Kroenig's (2009) legislative autonomy.

Second, this chapter reviewed existing research concerning factors affecting legislative and constitutional court autonomy. Review of this research indicates that, although it explains particular examples or issues, it does not allow a comparative assessment across a broad range of issues. Nor does the research fully account for the influence of supranational law and institutions. Consequently, the research question requires an explanation of both national and supranational impacts on legislative and constitutional court autonomy. In addition, consideration of the constitutional court's impact on human rights is required.

Third, was a discussion of five research efforts which, when combined, address the research question. Each of the research efforts addresses a particular aspect of the research question. In combination, this research sets expectations that assist in answering the research question.

Finally, was the presentation of three hypotheses that to assess the research question. The first hypothesis assesses the national interactions between the constitutional court and the legislature and their impact on each institution's autonomy. The second hypothesis assesses supranational influences on the autonomy of the legislature and constitutional court. The third hypothesis assesses the increased use of international human rights law. The results of these hypotheses contribute to an assessment of the research question.

The next chapter explains the methodology that used in tests of these hypotheses.

### 3 METHODOLOGY

To test these hypotheses this dissertation uses a comparative approach. The tests combine quantitative (objective and numeric) and qualitative (subjective, usually non-numeric) techniques. Quantitative methods allow testing of the hypotheses in a manner approaching scientific rigor. They identify the statistical likelihood that outcomes result from test conditions rather than random circumstances. Their accuracy, however, depends on the definitions and equations used by the researcher (Johnson and Reynolds, 2005). In addition, qualitative results improve as the number of cases and observations increase (Salkind, 2000). Quantitative methods indicate whether conditions are related but not whether one condition causes another (Johnson and Reynolds, 2005). Nor do they consider the political and legal context in which the conditions occur.

Qualitative methods address context and explanations. They analyze the influence of such things as history and social relations (Mahoney and Rueschemeyer, 2006). They allow consideration of the underlying political and social contexts. Qualitative methods focus on a small number of cases (Mahoney and Rueschemeyer, 2006). While qualitative methods look for statistically significant patterns applicable to the universe of cases, quantitative methods look for insight into specific cases and situations (Mahoney and Rueschemeyer, 2006). This is useful both to explain observations specific to a case or situation and to refine the focus of qualitative methods (Mahoney, 2006). Furthermore, subjective analysis of quantitative results explains the underlying causation behind the correlation. However, this method also reflects the personal bias and interpretation of the researcher. Used in combination, qualitative methods provide context to, and allow interpretation of, quantitative results. The result is a thorough answer to the research question.

When testing a hypothesis it is important to vary conditions to determine the effects of the test. A single case approach examines variances that occur within one country. A comparative approach

examines variances that occur across countries. When choosing cases the researcher has two options. He or she can use cases that are similar in as many respects as possible, also called the most similar case approach, or very different, also called the most different case approach (Lim, 2006). A most similar case approach provides inherent controls on data through the similarities across countries (Lim, 2006). Since countries are not identical, the controls assumed in a most similar case design are not perfect (Lim, 2006). Conversely, a most different case approach ensures variance in the conditions studied (Lim, 2006). Although this allows identification of relationships, underlying, or serendipitous, relationships are masked (Lim, 2006).

This chapter contains two sections. The first section reviews the hypotheses, identifies variables, presents the data used to operationalize the variables, and states the outcome required for acceptance of the hypotheses. The second section presents and justifies the cases used. An explanation of the quantitative and qualitative methodologies used occurs in each chapter. Detailed information about the qualitative and quantitative methods is included in subsequent chapters.

### **3.1 Hypotheses, Variables, and Data**

The last chapter presented three hypotheses to test possible answers to the research question. This section identifies and explains the variables in each hypothesis. Each hypothesis contains two types of variables: one dependent variable or the expected result, and independent variables or the conditions that change. In addition, a standard is set for the acceptance of each hypothesis.

*Increasing constitutional court autonomy increases the protection of human rights.*

The dependent variable in this hypothesis is the protection of human rights. The international community sees human rights abuses as the result of state action (Gready and Phillips, 2009; De Schutter, 2009; Rodley, 2009). If a state believes it can act with impunity, it will violate the human rights

of its citizens (Gready and Phillips, 2009; De Schutter, 2009; Rodley, 2009). Human rights violations range from non-violent, such as discrimination, to violent, such as torture or enforced disappearance (Gready and Phillips, 2009). Any state actor can violate human rights including, but not limited to, the executive, legislators, the military, and police forces (Gready and Phillips, 2009). To protect human rights actors, including but not limited to victims, use legislation, litigation, and advocacy (Gready and Phillips, 2009). The ability to enforce protections depends on national laws, the national constitution, and international treaties to which the state is a party. Similarly, actual protections vary with litigation and advocacy efforts as well as legal interpretations (Gready and Phillips, 2009). Consequently, protections are as varied as the abuses.

The political and legal context of each country prioritizes human rights and their protection (Klug, 2007; Pieterse, 2007). The variance between human rights protected in South Africa's constitution and those protected in the constitutions of most Western countries illustrates this point (Klug, 2007). There is variance in constitutional rights even among Western Democracies. For example, the rights protected in the constitution of France's Fifth Republic<sup>18</sup> differ from those in Ireland's constitution.<sup>19</sup> There is a basic set of human rights in international law as defined in international treaties.<sup>20</sup>

This hypothesis tests the ability of constitutional courts to adjudicate protections for human rights. It is possible to define 'protection of human rights' as actions by the constitutional court that check human rights abuses by the legislature. However, this definition is problematic for three reasons. First, to act constitutional courts require a case. Legislatures violate human rights by passing laws that harms citizens. For example, a legislature passes a law prohibiting free speech, a right protected by

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<sup>18</sup> Available at [http://www.servat.unibe.ch/icl/fr00000\\_.html](http://www.servat.unibe.ch/icl/fr00000_.html) accessed October 15, 2012

<sup>19</sup> Available at [http://www.servat.unibe.ch/icl/ei00000\\_.html](http://www.servat.unibe.ch/icl/ei00000_.html) accessed October 15, 2012.

<sup>20</sup> See the International Covenant for the Protection of Civil and Political Rights, the International Covenant for the Protection of Economic, Social, and Cultural Rights, the Convention Against Torture, the Convention on the Rights of the Child, the Convention for the Elimination of Discrimination Against Women.

international law,<sup>21</sup> European treaties,<sup>22</sup> and national constitutions.<sup>23</sup> The constitutional court protects human rights by invalidating such laws. Conversely, the constitutional court fails to protect human rights by upholding such laws. However, the constitutional court only takes these actions when presented with a case. Without a challenge to the law before the constitutional court, it cannot protect human rights.

Second, as described above, the political and legal context of a country influences the priority placed on various human rights (Klug, 2007; Pieterse, 2007). For example, former communist countries valued social rights over individual rights such as freedom of speech (Roth, 2004). Unless and until the society values individual rights, successful constitutional court challenges to these rights are unlikely.

A third problem with this definition is that one constitutional court decision may affect several human rights, limiting some while protecting others. For example, a decision framed as protecting freedom of speech might limit freedom of religion. Similarly, a law appearing to violate freedom of association may actually protect minorities from discrimination in the workplace. Even more concerning is the case where, on the surface, a constitutional court decision appears to protect human rights but the implementation of the decision allows further violations. A clear example of this is the United States Supreme Court decision in *Plessey v. Ferguson* (Epstein and Walker, 2004).<sup>24</sup> On the surface the decision ensures equal services for minorities but implementation justified segregation (Epstein and Walker, 2004). In these examples, a constitutional court decision seen as protecting human rights may actually sanction government abuses.

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<sup>21</sup> International Covenant on Civil and Political Rights Art. 19

<sup>22</sup> European Convention on Human Rights Art. 10

<sup>23</sup> Constitution of Poland Art. 54; Constitution of Romania Art. 30; Constitution of the Slovak Republic Art. 26. Freedom of speech or expression is not explicitly included in the Constitution of the Czech Republic. However, Art. 10 of the Czech Constitution incorporates human rights from ratified Human Rights Treaties. The Czech Republic ratified the International Covenant on Civil and Political Rights in 1993 ([http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)).

<sup>24</sup> The United States' Supreme Court does not meet the qualifications for a constitutional court as defined in this dissertation. However, Supreme Court does determine the constitutionality of laws thus is being used as an example.

Therefore, a rigorous assessment of the protection of human rights must look beyond constitutional court actions. to one premised on the 'protection of human rights' using established measures. Multiple independent, international organizations provide assessments of human rights across countries. Organizations such as Human Rights Watch and Amnesty International provide qualitative assessments. Organizations such as Freedom House and the World Bank provide quantitative measures. Countries, in particular the United States, also provide assessments of human rights in other countries. These measures provide several benefits. Because each assessment covers a broad range of countries, they facilitate cross-country comparisons. Since the groups update these assessments annually, they allow comparisons across time. The qualitative assessments cover a broad range of human rights. Quantitative measures focus on a subset of rights.

To ensure an unbiased assessment of human rights protections operationalization of this variable use these data from an international assessment of human rights. This has three advantages. First, it assesses the overall protection of human rights in the country. This overcomes the problems indicated above with basing the assessment on constitutional court actions. Second, it allows cross-national and time span comparison of data. Third, the organizations have the resources, rigor, and experience to ensure accuracy of the data.

The Cingranelli-Richards (CIRI) Human Rights Data Project provides an existing measure that uses these data for the protection of human rights variable.<sup>25</sup> CIRI provides several measures of human rights including physically harmful violations (torture, enforced disappearance), civil and political rights (freedom of speech and religion), and social rights (workers' rights) (CIRI Human Rights Project). This allows assessment of the protection of several different kinds of rights. As explained above, there is variation in the priority countries put on rights. For example, the former communist countries valued

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<sup>25</sup>Data are available at <http://ciri.binghamton.edu/> (Accessed February 20, 2012)

social rights above civil and political rights (Roth, 2004). CIRI assesses all rights without considering national context (CIRI Human Rights Project Coding Manual).

The value of this variable is a combination of several CIRI measures. First, the Physical Integrity Rights Index (CIRI Human Rights Project Coding Manual) measures protection of the most physically harmful human rights (killing, torture, imprisonment, disappearance). This measure includes rights in the Convention Against Torture, the International Convention for the Protection of All Persons From Enforced Disappearance, and some of the rights in the International Covenant on Civil and Political Rights. The value for this variable ranges from 0 (indicating that the acts have occurred frequently during the year) to 8 (indicating that the acts have not occurred during the year) (CIRI Human Rights Project Coding Manual).

Second, the CIRI measures Freedom of Assembly, Freedom of Foreign Movement, Freedom of Domestic Movement, Freedom of Speech, Freedom of Religion, and Freedom of Electoral Self-Determination (CIRI Human Rights Project Coding Manual) assess civil and political rights. These measures assess rights in the International Covenant on Civil and Political Rights. The value of each of these variables ranges from 0 (the right was severely limited or denied) to 2 (the right was relatively unrestricted) and is measured yearly (CIRI Human Rights Project Coding Manual).

Finally, the CIRI measures Workers' Rights, Women's Political Rights, and Women's Economic Rights (CIRI Human Rights Project Coding Manual) assess economic rights. These rights approximate the rights included in the International Covenant on Economic, Social, and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. The Workers' Rights variable measures the ability of workers to associate in the workplace and collectively bargain with their employers (CIRI Human Rights Project Coding Manual). This variable ranges from 0 (severely limited or denied rights) to 2 (relatively unrestricted rights) (CIRI Human Rights Project Coding Manual). The Women's Economic Rights variable measures the rights women enjoy in the economy, including



workplace discrimination and right to hold jobs (CIRI Human Rights Project Coding Manual). This variable ranges from 0 (women are afforded no legal economic protections) to 3 (women have a wide range of protections and the protections are enforced) (CIRI Human Rights Project Coding Manual). The Women's Political Rights variable measures political rights specifically associated with women (CIRI Human Rights Project Coding Manual). The values for this variable are 0 (no legal guarantees for women's political rights), 1 (women's political rights are legally guaranteed but severely limited in practice), 2 (women's rights are legally guaranteed but somewhat limited in practice), and 3 (women's rights are guaranteed legally and practiced) (CIRI Human Rights Project Coding Manual).

The key independent variable, the variable that changes, is constitutional court autonomy. As discussed in the last chapter, the definition used here for an autonomous constitutional court is a court that makes decisions without influence by other branches and its decisions are enforced. This definition has two parts. First, the constitutional court must be able to make decisions without influence by other branches. Second, the constitutional court must have the ability to enforce the decisions. In addition, both the *de jure* (according to the law) and *de facto* (according to reality) factors of constitutional court autonomy must be considered (Diaz and Fix, 2012; Rios-Figueroa and Staton, 2009). This variable, therefore, combines information from several different sources.

First, the nation's constitution provides data for the *de jure* assessment of this variable. Contained in the constitution is information on the constitutional court's jurisdiction, composition, and powers. Protection from dissolution, protection from removal, control over budget, and control over procedures affect the ability of the constitutional court to make decisions without influence. Finality of constitutional court decisions affects the ability of the court to enforce their decisions. Each factor has a value of 0 (no protection) or 1 (protected in the constitution).

Access to the constitutional court affects decision-making and enforcement. A court only decides cases brought before it. Thus, limits on who can bring a case affect the types of cases the court

hears. Furthermore, limitations on jurisdiction limit visibility of court actions. If only political elites access the constitutional court, the average citizen has little knowledge of its actions. This provides political elites little electoral incentive to abide by the court's decisions. Thus, the greater the access to the constitutional court the greater its decision-making and enforcement capabilities. This factor has a value of 0 (limited access) or 1 (all citizens have access to the court).

Access to the constitutional court also includes when challenges to laws occur. Constitutional challenges to a law occur *a priori* (before the law is promulgated), *a posteriori* (after the law is promulgated), or both. If the constitutional court hears only *a priori* cases, it prevents addressing human rights violations resulting from implementation of the law. If the constitutional court hears only *a posteriori* cases, human rights violations occur before challenges come to the court. *A posteriori* review also limits the constitutional court to the facts presented in the case. Thus, a constitutional court with both *a priori* and *a posteriori* review has the greatest access. This factor has a value of 0 (only *a priori* or *a posteriori* review) or 1 (no limit on the timing of cases).

Finally, as discussed in the previous chapter, the group appointing judges influences the court. Appointments by the legislative and executive branches are inherently political. Appointments by a legal organization, such as a bar association, are removed from national politics. This factor has a value of 0 (all constitutional court judges appointed by another branch), 1 (some judges appointed by another branch), or 2 (no judges appointed by another branch).

The measure of de facto constitutional court autonomy follows the work of Howard and Carey (2003). The best measurement of de facto autonomy is information directly from people involved in the process. A proxy measure replaces obtaining direct information from judges, lawyers, and legislators.<sup>26</sup> Following the work of Howard and Carey (2003), this factor uses information from the United States Department of State Country Reports. This factor has a value of 0 (reports indicate an effective judiciary

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<sup>26</sup> Former constitutional court judges, academics, and lawyers in the countries included in this dissertation received surveys. However, there was no response.

with few reports of undue influence), 1 (reports indicate problems with the effectiveness of the judiciary or undue judicial influence), and 2 (reports indicate an ineffective judiciary and undue judicial influence).

Coding the de facto factors from the information in the United States Department of State Country Reports on Human Rights Practices requires qualitative analysis concerning the impact on the constitutional court. These reports include information on both the judiciary and courts in general. Interpretation is required to ensure that coding includes only the information relevant to the constitutional courts. The employment of three guidelines in this analysis minimizes the risk of arbitrary interpretation. The basis for these guidelines is existing research on factors that influence constitutional courts.

The basis for the first guideline is research indicating the political roots of constitutional court judges (Kühn, Zdeněk, 2007). This becomes particularly important when juxtaposed with research indicating constitutional courts willingness to support issues such as minority rights in the face of political resistance (Maveety and Grosskopf, 2004). Therefore, according to the first guideline, if the constitutional court upholds laws that limit minority rights it is evidence that the constitutional court lacks de facto autonomy.

The second guideline derives from research on judicial behaviors. This research indicates that judges with limited qualifications or training make restrained decisions (Bugaric, 2001). This is particularly important when emerging from a communist law system where law was a tool for the state to achieve its objectives (Reichel, 1999). Applying this research to the post-communist situation, a judge constitutional court judge trained under communist law would be personally hesitant to overturn legislation (Tanasescu, 2012). Poor training might also limit the willingness or ability of a judge to refer to international law thus limiting protections for human rights (Alter, 2009). Although poor qualifications or training affect judicial decisions at any level, it is particularly impactful at the constitutional court level where decisions can be more complex (Cossman and Schneiderman, 2007).

Therefore, according to this guideline, reports of a poorly trained judiciary are evidence that the constitutional court lacks de facto autonomy.

Finally, some of the reports indicate that the judiciary is subject to political influence. However, the process for appointing constitutional court judges is not always the same as appointing other members of the judiciary. For example, appointment to the constitutional court may require legislative approval whilst a single body appoints other members of the judiciary. Therefore, assessment of reports of judicial influence occurs in the context of constitutional court appointments.

Constitutional court autonomy is a summation of these factors. The values range from 0 to 11.

Acceptance of this hypothesis requires a statistically significant correlation between constitutional court autonomy and protection of human rights. In addition, the two variables must co-vary. Countries with higher levels of constitutional court autonomy must have higher protection of human rights.

*As supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures*

The dependent variable, or measured outcome, is constraints placed on the legislature by the constitutional court. Constitutional courts constrain the legislature in several ways (Vanberg, 1998). Constraints include, but are not limited to, limitations on legislative actions, annulment of laws, instructions on drafting of laws, or the threat of constitutional court review of legislation by legislatures during debates (Vanberg, 1998).

This variable is a modified version of Fish and Kroenig's (2009) measure of legislative autonomy. Fish and Kroenig (2009) measure legislative autonomy based on 32 items (2009). The modification used

here limits the measurement to constitutional court constraints on the legislature. Values are 0 (judicial review of legislation is not allowed) or 1 (judicial review of legislation is allowed).

The above represent de jure constitutional court constraint of the legislature. De facto constraints are equally important. References to the constitutional court in legislative debates indicate de facto constraints. These are comments during the debate that indicate the legislators consider constitutional court action. They might write legislation following instructions in past constitutional court decisions. They might write legislation to prevent future constitutional court action. Alternatively, one group of legislators might threaten future constitutional court action to gain concessions in the legislation. Values for this factor are 0 (constitutional court is not referenced in parliamentary debates), 1 (references to constitutional court involve decisions only), or 2 (references to constitutional court include both decisions and threats to challenge laws being debated). As discussed in the previous chapter, the national political context influences relations between the constitutional court and legislature. Assessment of this value occurs yearly.

The total value of this variable sums the values for each factor. Values range from 0 to 3.

The independent variable, or manipulated condition, is supranational constraints related to democracy and the protection of human rights. These supranational constraints take various forms. De jure constraints are international and regional treaties which, when signed and ratified, require state compliance.<sup>27</sup> Since the research question is concerned with human rights, only international human rights treaties are considered. Each of the following treaties values are 0 (not signed or ratified), 1 (signed not ratified), or 2 (signed and ratified):

the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention Against Torture (CAT), the International Convention for the Protection of All Persons from Enforced Disappearances, and the Convention on the

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<sup>27</sup> See Vienna Convention on the Law of Treaties 1969).

Elimination of All Forms of Discrimination Against Women (CEDAW), Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter, Framework Convention for the Protection of National Minorities. Values change as the status of the treaty change.

Pre-accession requirements and agreements impose constraints on states seeking to join the European Union (Albi, 2009; Emmert, 2009; Kühn, 2004). European Union membership offers economic and other benefits (Albi, 2009). Scrutiny, therefore constraints, varies with European Union status (Albi, 2009). As countries approach accession, the amount of scrutiny, and incentive to comply, increases (Albi, 2009). Once the country is a member the amount of scrutiny, and incentive to comply, decreases (Albi, 2009). Coding for European Union pre-accession constraints is 0 (member or not applicable), 1 (under consideration), and 2 (accession decision within a year). Evaluation of this variable occurs yearly.

The independent variable's value is a sum of the above factors. Values range from 0 to 18.

Acceptance of this hypothesis requires a statistically significant positive correlation between supranational constraints and legislative constraints. Countries with higher levels of supranational constraints must also have higher level of legislative constraints imposed by the constitutional courts. Conversely, countries with lower levels of supranational constraints must have few legislative constraints imposed by the constitutional court.

*Courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral.*

The use of international human rights law in constitutional court decisions is the dependent variable or outcome. Constitutional court decisions may not explicitly state the use of international human rights law (Emmert, 2009; Powell and Staton, 2009; Schimmelfennig, 2006). The court may

consider international human rights law as they arrive at the decision. However, the court is not required to include these documents in the written decision (Powell and Staton, 2009). Some legal cultures do not consider it appropriate to use international law (Emmert, 2009). Conversely, some constitutional courts see the use of international law as a way to increase the legitimacy of their decisions (Schimmelfennig, 2006).

There is no accurate way to fully understand and accommodate all the reasons a constitutional court may or may not use international human rights law in their decisions. However, the only definitive proof that the constitutional court considered international human rights law is inclusion in the written decision. References to international human rights law can include, but are not limited to, international treaties (including but not limited to United Nations treaties and International Labor Organization treaties), regional treaties (such as European Union treaties), and regional court decisions (European Court of Justice, and European Court of Human Rights). Each constitutional court decision is coded as 0 (no reference) or 1 (international human rights law is referenced).

Type of transition to democracy is the independent, or manipulated, variable. Transitions to democracy can occur in a variety of ways, some peaceful while others are violent. Negotiated transitions involve all groups in the development of the rules of the new government. A non-negotiated transition occurs when a single group or party decides the rules of the new government. Coding of this variable is 0 (the transition resulted in a constitution dictated by a single group or excluding members of the prior regime), 1 (there was a peaceful and agreed upon transition of power but the prior regime was excluded from creation of the constitution), or 2 (there was a peaceful and agreed upon transition and both the current and prior regime were involved in negotiations of the constitution).

Acceptance of this hypothesis requires evidence of a positive statistical correlation between a negotiated transition to democracy and the use of international human rights law in constitutional court

decisions. The less negotiated the transition to democracy and construction of the new constitution the less the constitutional court must use international human rights law in their decisions.

### 3.2 Cases

This dissertation uses several criteria for case selection. First, the cases must be subject to supranational constraints. This requires a supranational legal system specifically imposed to ensure the consolidation of democracy and protection of rights. Supranational legal systems include the Organization of American States, the African Union, and the European Union. In addition, this research requires that the supranational legal system's influence must vary. The European Union satisfies these requirements. It has a strong supranational legal system (Alter, 2003; Baudenbacher, 2003; Jacobs, 2003) and several binding human rights treaties (Buergenthal, Shelton, and Stewart, 2002).<sup>28</sup> In addition, the European Union establishes strict guidelines for accession (Magnette and Nicolaidis, 2004).

Second, the cases must have both a legislature and a constitutional court. Constitutional courts are specifically required for two reasons. First, constitutions specifically grant the power of judicial review to constitutional courts. Further, judicial review is the primary function of constitutional courts. Judicial review is the power to determine the constitutionality of legislative actions (Ginsberg et al, 2011). Therefore, constitutional courts have a specific jurisdiction. Second, as explained in the previous chapter, constitutions define the power, structure, and jurisdiction of constitutional courts. This facilitates comparison across cases.

Finally, variance is required in the transition to democracy, consolidation of democracy, protection of human rights, and autonomy of institutions. Variance in these features across established democracies is subtle but does exist. The variances are more noticeable in countries transitioning to democracy (Mendes, 2011).

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<sup>28</sup> European Convention on Human Rights, European Social Charter, European Convention Against Torture, Framework Convention for the Protection of National Minorities



The post-communist countries of Central Eastern Europe meet these criteria. First, the European Union strongly influenced these countries since their independence (Piana, 2009). EU influence varies during the membership accession process. Granting or delaying membership causes additional variances in influence. Second, these countries have both a legislature and constitutional court with variances in the powers of both institutions across countries. Third, variance exists in the transition to democracy, consolidation of democracy, and protection of human rights.<sup>29</sup> Therefore, cases are post-communist countries from Central Eastern Europe.

The selected cases are post-communist countries admitted to the European Union on or before 2007. Cases are the Czech Republic, Slovakia, Poland, and Romania. Two points justify selection of these countries. First, the transition to democracy varies across the countries. Romania transitioned through a violent coup. Poland's transition was relatively peaceful. Furthermore, Poland's communist party returned to power after the first election. Czechoslovakia had a non-violent revolution. The Slovak Republic transitioned peacefully from the Czech Republic. Second, for these countries both constitutional court decisions and parliamentary debates are available on-line. Some of the information is only available in the native language. However, it is in a format conducive to text translation.

Testing of the hypotheses uses data from 1990 through 2009. This allows assessment of the European Union impact both before and after accession. All available constitutional court decisions are included. Most studies limit court decisions to specific topics or cases. The inclusion of all decisions here occurs for two reasons. First, any constitutional court decision affects human rights or democracy. Constitutional courts adjudicate compliance with the constitution. In a democracy, a constitution defines the country's rules. Constitutions protect rights. Thus, constitutional courts protect rights and democracy. Second, the research question considers the relationship between constitutional courts and legislatures. Potentially, any constitutional court case affects this relationship.

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<sup>29</sup> Based on Freedom House and CIRI data.

This case selection includes inherent controls. For example including only constitutional courts limits the cases, law, and interactions. Lower courts are increasingly active in the protection of the constitution and human rights (Schimmelfennig, 2006). However, their inclusion increases complexity because of the variations in legal and national court systems. Lower courts adjudicate cases based on specific national and local laws. These laws vary within and across countries. There is further variance in the structure and function of lower courts. A constitutional court focus minimizes legal differences. Additionally, constitutional courts have direct impact on the national legislature.

Second, supranational influence is limited to the European Union. European Union laws and treaties are clearly documented and binding. EU members sign and ratify a common set of treaties. This eliminates variance in regional treaties. In addition, European Union membership imposes an expectation of democratization and respect for human rights. This subsequently imposes constraints on countries. EU constraints increase in the period prior to accession. This creates variance across countries and over time

### **3.3 Conclusion**

This chapter provided an overview of the methods to test the research question. It started by defining variables associated with each hypothesis. Explanations included an operationalization of the variables. Each of the variables is an aggregate of several scalar measures. Thus, variables reflect a variety of possible conditions. The protection of human rights variable in the first hypothesis uses data from an independent source. All other variables rely on data collected as part of this research.

Five sources provide data for this research. The human rights measures are from the CIRI Human Rights Data Project. Second, national constitutions provide information on legislative and constitutional court autonomy. Fish and Kroenig's (2009) research provides additional information on legislative autonomy. Fourth, international treaties provide information on supranational constraints.

Finally, constitutional court decisions and parliamentary debates provide information on legislative constraints and the use of international sources.

Four countries are cases. All four countries are in Central Eastern Europe. They are all currently members of the European Union. They are all post-communist transitions to democracy. They all have constitutional courts. However, there is variance in their transitions to democracy, supranational constraints, and human rights protections.

As mentioned, an explanation of the quantitative and qualitative methods used occurs with the actual tests. The next chapter tests the first hypothesis.

## 4 FIRST HYPOTHESIS

This chapter tests the first of the dissertation's three hypotheses. The first hypothesis asks whether constitutional courts effectively protect human rights as evidenced by an independent, comparative measure of human rights. Existing research posits that human rights litigation allows courts to increase their autonomy vis-à-vis the other political institutions (Koopmans, 2003). This is particularly important for constitutional courts in the European Union who feel trapped between supranational courts and lower national courts (Alter, 2001; Conant, 2001). However, for this strategy to work long term the courts must deliver on the protection of human rights. This hypothesis tests whether this strategy is working.

### 4.1 Variables

As described in Chapter 3, the first hypothesis, *increasing constitutional court autonomy increases the protection of human rights*, has two variables. The dependent variable, the expected result, is the protection of human rights. The key independent variable is the autonomy of the constitutional court. Chapter 3 presented the definition of these variables. This section presents the data associated with these variables.

#### 4.1.1 Protection of human rights

As explained in Chapter 3, the protection of human rights variable uses data from the Cingranelli-Richards (CIRI) Human Rights Data Project.<sup>30</sup> To ensure inclusion of all the various types of human rights this variable combines several CIRI measures. Combined into this variable are Physical Integrity Rights, Freedom of Assembly, Freedom of Foreign Movement, Freedom of Domestic Movement, Freedom of Speech, Freedom of Religious, Freedom of Electoral Self-Determination, Workers' Rights, and Women's

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<sup>30</sup> Data is available at <http://ciri.binghamton.edu/> (Accessed December 28, 2012)

Economic Rights. All these variables except Physical Integrity Rights, Women's Political Rights, and Women's Economic Rights range in value from 0 (the right was severely limited) to 2 (the right is relatively unrestricted) (CIRI Human Rights Project Coding Manual). The value of Women's Economic Rights and Women's Political Rights range from 0 (no legal protections) to 3 (legal protections are enforced) (CIRI Human Rights Project Coding Manual). Physical Integrity Rights is a combination of several variables that measure torture, political imprisonment, and enforced disappearance (CIRI Human Rights Project Coding Manual). The value for this variable ranges from 0 (frequent occurrence of all acts) to 8 (no occurrence of the acts) (CIRI Human Rights Project Coding Manual). The Protection of Human Rights variable in this hypothesis is a summation of these various CIRI measures. Values for the Protection of Human Rights range from 0 (no protections) to 28 (all rights protected).

Table 4.1 shows the CIRI values for the cases selected for this study.<sup>31</sup> (Dryzek and Holmes, 2002). A perusal of the raw data indicates that values change both within and across countries. It further indicates that all of the countries have some level of human rights violations as demonstrated by the lack of any country reaching the maximum score of 25.

**Table 4.1 CIRI Data for Cases from 1990 Through 2010**

Country	Year	Phy	Assn	Foreign	Dom est	Speech	Elect	Religion	Worker	Women	Total
Czechoslovakia	1990	8	2	2	2	1	2	1	1	1	20
Czechoslovakia	1991	8	2	2	2	2	2	2	1	2	23
Czechoslovakia	1992	8	2	2	2	1	2	2	1	2	22
Czech Republic	1993	8	2	2	2	2	2	2	1	2	23
Czech Republic	1994	6	2	2	2	1	2	2	1	2	20

<sup>31</sup> That Czechoslovakia has values for 1990 through 1992 while the Czech and Slovak Republics have no values for these years. This is because the Czech and Slovak Republics did not become separate countries until 1993

Country	Year	Phy	Assn	Foreign	Dom est	Speech	Elec t	Religion	Worker	Wome n	Tota l
Czech Republic	1995	5	2	2	2	1	2	2	1	2	19
Czech Republic	1996	8	1	2	2	2	2	2	2	2	23
Czech Republic	1997	8	1	2	2	2	2	1	2	2	22
Czech Republic	1998	7	1	2	2	2	2	2	1	2	21
Czech Republic	1999	8	2	2	2	2	2	2	2	2	24
Czech Republic	2000	7	1	2	2	2	2	2	1	2	21
Czech Republic	2001	8	1	2	1	2	2	2	2	2	22
Czech Republic	2002	8	1	2	2	2	2	1	1	2	21
Czech Republic	2003	7	2	2	2	2	2	2	1	1	21
Czech Republic	2004	6	2	2	2	2	2	1	1	2	20
Czech Republic	2005	7	1	2	2	1	2	1	1	1	18
Czech Republic	2006	7	1	2	2	1	2	1	1	2	19
Czech Republic	2007	7	1	2	2	1	2	2	2	2	21
Czech Republic	2008	7	1	2	2	2	2	2	1	2	21
Czech Republic	2009	7	1	2	2	2	2	2	1	2	21
Czech Republic	2010	8	1	2	2	2	2	2	1	1	21
Poland	1990	6	1	2	2	2	2	2	1	2	20
Poland	1991	6	2	2	2	1	2	2	2	2	21
Poland	1992	6	2	2	2	1	2	1	2	1	19
Poland	1993	7	2	2	2	1	2	2	1	1	20
Poland	1994	8	1	2	2	2	2	1	1	1	20
Poland	1995	7	2	2	2	1	1	2	1	1	19
Poland	1996	7	2	2	2	1	2	2	1	1	20
Poland	1997	8	2	2	2	1	2	2	2	1	22
Poland	1998	7	2	2	2	2	2	2	2	1	22
Poland	1999	8	2	2	2	1	2	2	2	1	22

Country	Year	Phy	Assn	Forei gn	Dom est	Spee ch	Elec t	Religion	Wor ker	Wome n	Tota l
Poland	2000	6	2	2	2	1	2	2	2	1	20
Poland	2001	7	2	2	2	1	2	2	0	1	19
Poland	2002	8	2	2	2	1	2	2	0	2	21
Poland	2003	7	2	2	2	1	2	2	0	1	19
Poland	2004	6	2	2	2	2	2	2	0	1	19
Poland	2005	7	1	2	2	1	2	2	0	1	18
Poland	2006	7	1	2	2	1	2	2	0	1	18
Poland	2007	7	2	2	2	1	2	2	0	2	20
Poland	2008	7	2	2	2	1	2	2	0	1	19
Poland	2009	6	2	2	2	1	1	2	1	1	18
Poland	2010	7	2	2	2	1	2	2	1	1	20
Romania	1990	4	1	2	2	1	1	2	1	2	16
Romania	1991	5	2	2	2	2	2	2	1	1	19
Romania	1992	6	1	2	2	1	1	2	0	1	16
Romania	1993	7	1	2	2	2	2	2	1	1	20
Romania	1994	6	1	2	2	1	1	1	1	1	16
Romania	1995	6	2	2	2	1	1	0	1	1	16
Romania	1996	7	2	2	2	1	2	0	1	1	18
Romania	1997	6	1	2	2	1	1	0	1	1	15
Romania	1998	7	2	2	2	1	2	0	1	1	18
Romania	1999	6	1	2	2	1	2	1	1	1	17
Romania	2000	5	2	2	2	1	1	1	1	1	16
Romania	2001	6	2	2	2	1	2	0	1	1	17
Romania	2002	6	2	2	2	1	2	1	0	1	17
Romania	2003	6	2	2	2	1	2	1	0	2	18
Romania	2004	5	2	2	2	0	1	1	0	2	15
Romania	2005	6	1	2	2	1	1	0	0	1	14
Romania	2006	5	1	2	2	1	1	1	0	1	14
Romania	2007	5	1	2	2	1	1	0	1	1	14
Romania	2008	5	1	2	2	1	0	0	1	1	13
Romania	2009	5	1	2	2	1	1	1	1	1	15
Romania	2010	5	1	2	2	1	1	0	0	2	14
Slovakia	1993	6	2	2	2	1	2	2	2	2	21
Slovakia	1994	8	2	2	2	1	1	2	2	2	22
Slovakia	1995	7	2	1	1	1	1	2	2	1	18
Slovakia	1996	6	2	2	2	1	1	2	2	1	19
Slovakia	1997	7	2	2	2	1	1	2	1	1	19

Country	Year	Phy	Assn	Foreign	Domest	Speech	Elect	Religion	Worker	Women	Total
Slovakia	1998	7	2	2	2	1	2	2	2	2	22
Slovakia	1999	7	2	1	2	1	2	2	2	2	21
Slovakia	2000	6	2	1	2	1	1	2	2	1	18
Slovakia	2001	7	2	1	2	1	2	0	2	1	18
Slovakia	2002	7	2	1	2	1	2	2	2	1	20
Slovakia	2003	6	2	1	2	2	2	1	2	1	19
Slovakia	2004	7	2	2	2	2	2	2	2	1	22
Slovakia	2005	8	2	2	2	2	2	1	2	1	22
Slovakia	2006	7	1	2	2	2	2	1	2	1	20
Slovakia	2007	7	2	2	2	1	2	1	2	2	21
Slovakia	2008	7	2	2	2	1	0	1	1	1	17
Slovakia	2009	7	2	2	2	1	1	1	1	1	18
Slovakia	2010	7	2	2	2	1	1	1	1	2	19

Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Phy = Physical Integrity

Assn = Freedom of association

Foreign = Freedom to move outside the country

Domest = Freedom of movement within the country

Speech = Freedom of speech

Elect = Electoral freedom

Religion = Freedom of religion

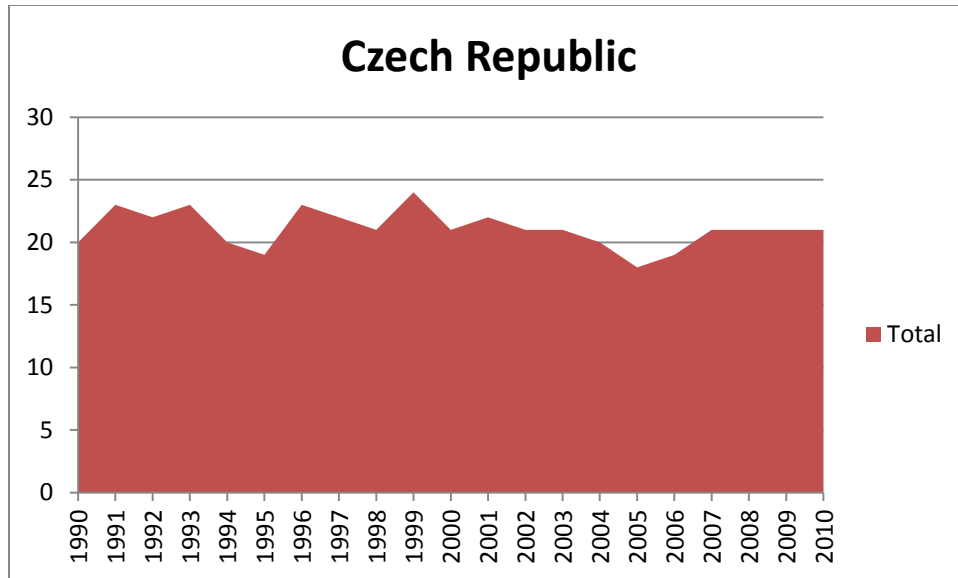
Worker = Freedom for workers to associate and collectively bargain

Women = Protection of women's economic rights

Total = Summation of variables

Figure 4.1 presents the total values for the Czech Republic for 1990 through 2010. Although the summed value varied through the years, it remained constant at 21 since 2008. The raw data for the Czech Republic in Table 4.1 shows that the steady total value belies the changes in individual measures. For example, between 2009 and 2010 the Czech Republic's physical integrity score increased while women's economic rights decreased.



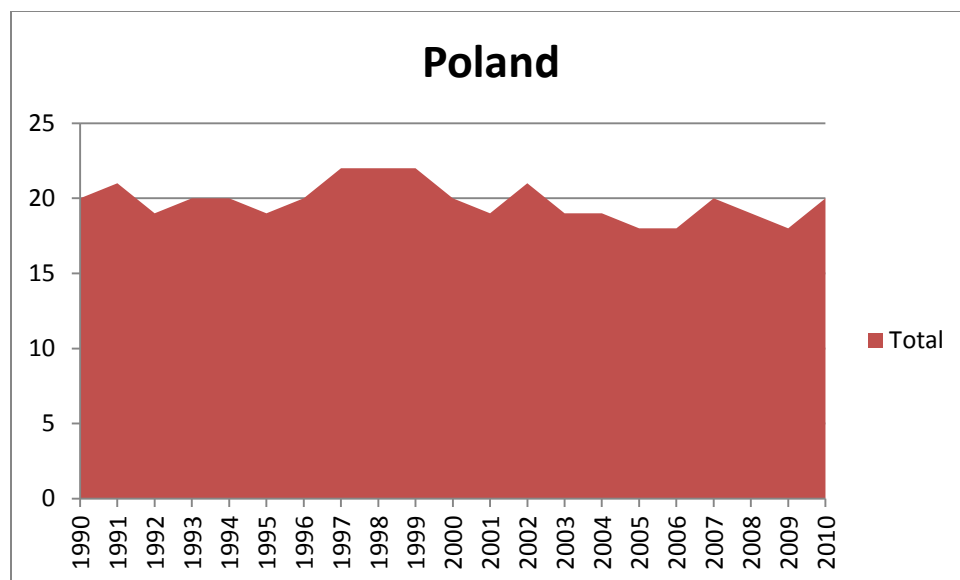


**Figure 4.1 Summation of CIRI Values for Czech Republic 1990-2010**

Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Total = Summation of CIRI measures of physical integrity, freedom of association freedom to move outside the country, freedom of movement within the country, freedom of speech, electoral freedom, freedom of religion, freedom for workers to associate and collectively bargain, protection of women's economic rights for the Czech Republic

Figure 4.2 illustrates that Poland's total CIRI score peaked between 1997 and 1999 the fluctuated never returning to that high score. The detail data in Table 4.1 shows that, with the exception of six years, four of which were 1997 through 2000, Poland limited worker's rights. This is interesting because the worker's movement ultimately resulted in the fall of communism in Poland (Kesselman et al, 2009). In fact, the raw data shows that worker's rights were severely limited in the years 2001 through 2008.



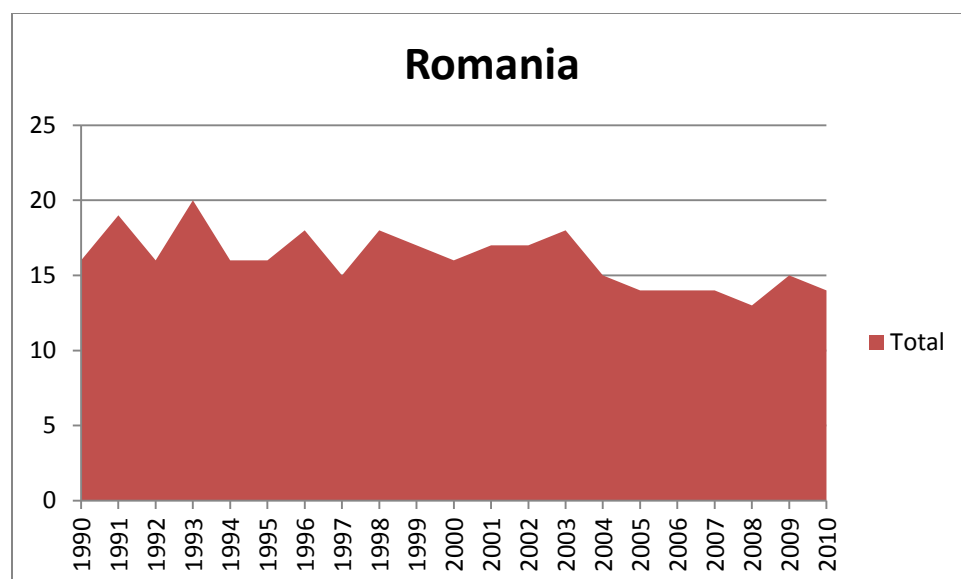
**Figure 4.2 Summation of Ciri Values for Poland 1990-2010**

Source: Ciri Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Total = Summation of Ciri measures of physical integrity, freedom of association freedom to move outside the country, freedom of movement within the country, freedom of speech, electoral freedom, freedom of religion, freedom for workers to associate and collectively bargain, protection of women's economic rights for the Czech Republic

Romania's Ciri scores have been trending downward since a high in 1993 as illustrated in Figure

4.3. The only rights consistently well protected are freedom of foreign and domestic movement. Both physical integrity and worker's rights were restricted through the entire period reported.

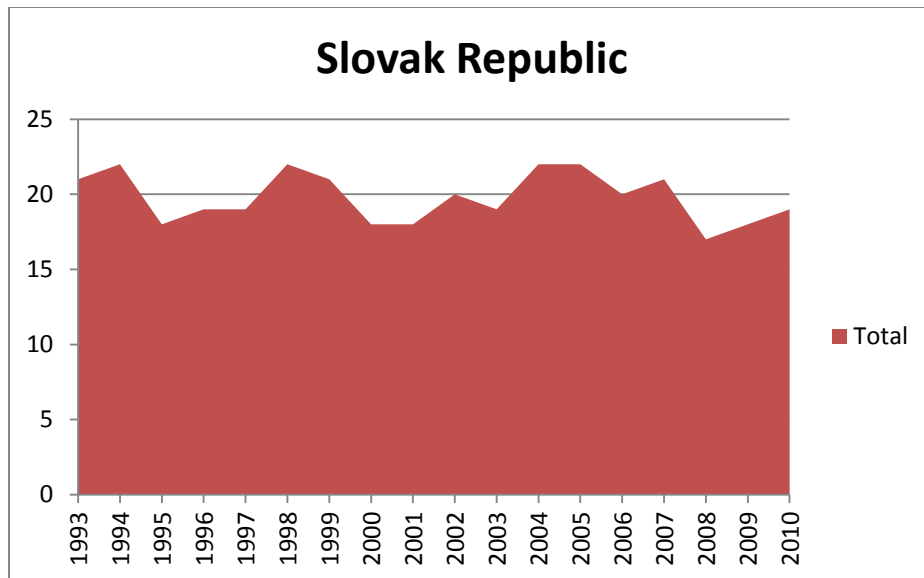


**Figure 4.3 Summation of CIRI Values for Romania 1990-2010**

Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Total = Summation of CIRI measures of physical integrity, freedom of association freedom to move outside the country, freedom of movement within the country, freedom of speech, electoral freedom, freedom of religion, freedom for workers to associate and collectively bargain, protection of women's economic rights for the Czech Republic

Figure 4.4 illustrates the Slovak Republic is steadily improving after its lowest score in 2008. The Slovak Republic fully protected each human right measured by CIRI at least once during the period 1993 through 2010. Only electoral rights and religious freedom went one year without some level of protection.

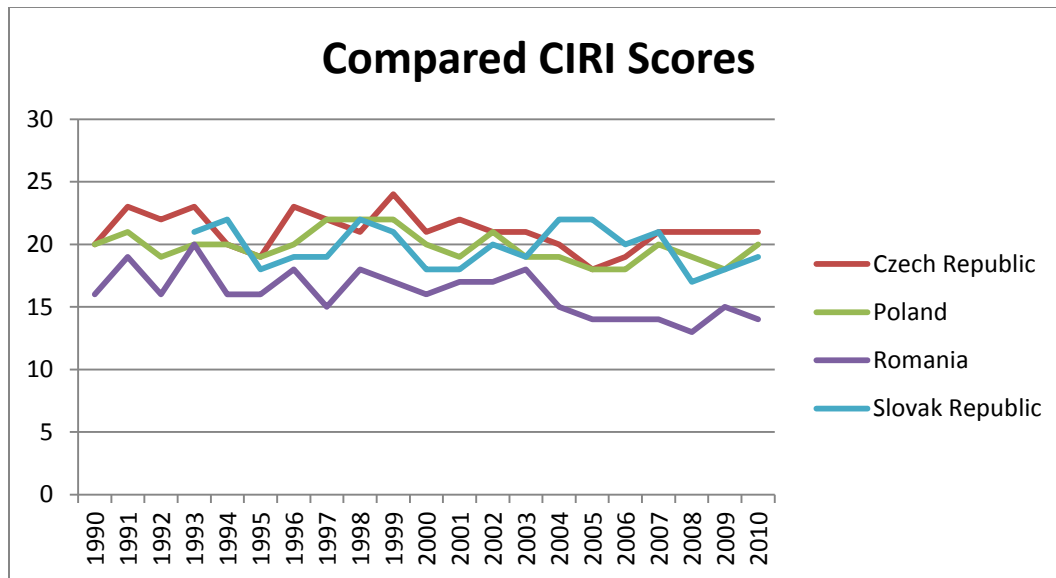


**Figure 4.4 Summation of Ciri Values for Slovak Republic 1990-2010**

Source: Ciri Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Total = Summation of Ciri measures of physical integrity, freedom of association freedom to move outside the country, freedom of movement within the country, freedom of speech, electoral freedom, freedom of religion, freedom for workers to associate and collectively bargain, protection of women's economic rights for the Czech Republic

Figure 4.5 compares all four cases. This Figure illustrates that protection of rights, as measured by Ciri, in Romania is lower than the other cases. It also illustrates that the Czech and Slovak Republics tend to have greater protection of Ciri measured rights. Based on this comparison the first hypothesis, increasing constitutional court autonomy increases the protection of human rights, expects Romania to have less constitutional court autonomy than the other cases. The Figures also illustrate that over time protections of human rights vary within the country. Therefore, the first hypothesis also expects a variance in constitutional court autonomy.



**Figure 4.5 CIRI Values for Czech Republic, Poland, Romania, Slovak Republic 1990-2010**

Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Summation of CIRI measures of physical integrity, freedom of association freedom to move outside the country, freedom of movement within the country, freedom of speech, electoral freedom, freedom of religion, freedom for workers to associate and collectively bargain, protection of women's economic rights for the Czech Republic

#### **4.1.2 Constitutional Court Autonomy**

As explained in Chapter 3, the measure of constitutional court autonomy used here is a combination of de jure and de facto factors. The de jure factors derive from the constitution. The de facto factors derive from the United States Department of State Country Reports on Human Rights Practices. Chapter 3 identified the components used here. This section explains the assigning of values to each factor.

Several events occurred that influence the data. Czech and Slovak Republics separated in 1993 (Dryzek and Holmes, 2002). Constitutional courts in Romania, Czech Republic, and Slovak Republic came

into existence in 1992<sup>32</sup>, 1993<sup>33</sup>, and 1992<sup>34</sup> respectively. Poland established a Constitutional Tribunal in 1985 (Kuhn, 2007) based on a 1982 constitutional amendment (Brzezonski, 1993). Therefore, only Poland has data for the years 1990 through 1993.

Table 4.2 presents the de jure and de facto data for the constitutional courts. Since the United States Department of State Country Reports on Human Rights Practices are available only for the years 1993 through 2011<sup>35</sup> only these years are shown. Since only Poland had a constitutional court prior to 1992 this limitation has minimal impact on this study. Note that data for 1993 for the Czech Republic is not available. Although established in 1993 the Czech Constitutional was not fully functional until December 1993.<sup>36</sup> Consequently, if 1993 were included for the Czech Republic the result would be comparing human rights data for a full year against constitutional court influence of one month. Therefore, 1993 is not included in this study.

**Table 4.2 De Facto and De Jure Constitutional Court Autonomy**

Country	Year	Dissolve	Remove	Budget	Proc	Final	Access	Review	Appoint	DeFacto
Czech Republic	1994	0	0	0	0	1	1	0	0	2
Czech Republic	1995	0	0	0	0	1	1	0	0	2
Czech Republic	1996	0	0	0	0	1	1	0	0	2
Czech Republic	1997	0	0	0	0	1	1	0	0	2
Czech Republic	1998	0	0	0	0	1	1	0	0	2

<sup>32</sup> Based on information in the U. S. Department of State Romanian Human Rights Practices, 1993 available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eur/Romania.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/Romania.html) Accessed December 31, 2012

<sup>33</sup> Based on information in the U. S Department of State Czech Republic Human Rights Practices, 1993 available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eur/CzechRepublic.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/CzechRepublic.html) Accessed December 31, 2012

<sup>34</sup> Based on information in the U. S. Department of State Slovak Republic Human Rights Practices, 1993 available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eur/SlovakRepublic.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/SlovakRepublic.html) Accessed December 31, 2012

<sup>35</sup> Based on information in the U. S. Department of State Slovak Republic Human Rights Practices, 1993 available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eur/SlovakRepublic.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/SlovakRepublic.html) Accessed December 31, 2012

<sup>36</sup> Based on information in the U. S Department of State Czech Republic Human Rights Practices, 1993 available at [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eur/CzechRepublic.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/CzechRepublic.html) Accessed December 31, 2012

Country	Year	Dissolve	Remove	Budget	Proc	Final	Access	Review	Appoint	DeFacto
Czech Republic	1999	0	0	0	0	1	1	0	0	1
Czech Republic	2000	0	0	0	0	1	1	0	0	1
Czech Republic	2001	0	0	0	0	1	1	0	0	1
Czech Republic	2002	0	0	0	0	1	1	0	0	1
Czech Republic	2003	0	0	0	0	1	1	0	0	1
Czech Republic	2004	0	0	0	0	1	1	0	0	1
Czech Republic	2005	0	0	0	0	1	1	0	0	1
Czech Republic	2006	0	0	0	0	1	1	0	0	1
Czech Republic	2007	0	0	0	0	1	1	0	0	1
Czech Republic	2008	0	0	0	0	1	1	0	0	1
Czech Republic	2009	0	0	0	0	1	1	0	0	1
Czech Republic	2010	0	0	0	0	1	1	0	0	1
Poland	1993	0	0	0	0	0	1	1	0	1
Poland	1994	0	0	0	0	0	1	1	0	1
Poland	1995	0	0	0	0	0	1	1	0	2
Poland	1996	0	0	0	0	0	1	1	0	2
Poland	1997	0	0	0	0	0	1	1	0	2
Poland	1998	0	0	0	0	0	1	1	0	2
Poland	1999	0	0	0	0	1	1	1	0	2
Poland	2000	0	0	0	0	1	1	1	0	2
Poland	2001	0	0	0	0	1	1	1	0	2
Poland	2002	0	0	0	0	1	1	1	0	2
Poland	2003	0	0	0	0	1	1	1	0	2
Poland	2004	0	0	0	0	1	1	1	0	2
Poland	2005	0	0	0	0	1	1	1	0	1
Poland	2006	0	0	0	0	1	1	1	0	1
Poland	2007	0	0	0	0	1	1	1	0	1
Poland	2008	0	0	0	0	1	1	1	0	1
Poland	2009	0	0	0	0	1	1	1	0	1
Poland	2010	0	0	0	0	1	1	1	0	1
Romania	1993	1	1	1	0	0	0	1	0	0

Country	Year	Dissolve	Remove	Budget	Proc	Final	Access	Review	Appoint	DeFacto
Romania	1994	1	1	1	0	0	0	1	0	0
Romania	1995	1	1	1	0	0	0	1	0	0
Romania	1996	1	1	1	0	0	0	1	0	1
Romania	1997	1	1	1	0	0	0	1	0	1
Romania	1998	1	1	1	0	0	0	1	0	1
Romania	1999	1	1	1	0	0	0	1	0	0
Romania	2000	1	1	1	0	0	0	1	0	0
Romania	2001	1	1	1	0	0	0	1	0	0
Romania	2002	1	1	1	0	0	0	1	0	0
Romania	2003	1	1	1	0	1	0	1	0	1
Romania	2004	1	1	1	0	1	0	1	0	1
Romania	2005	1	1	1	0	1	0	1	0	1
Romania	2006	1	1	1	0	1	0	1	0	1
Romania	2007	1	1	1	0	1	0	1	0	1
Romania	2008	1	1	1	0	1	0	1	0	1
Romania	2009	1	1	1	0	1	0	1	0	1
Romania	2010	1	1	1	0	1	0	1	0	1
Slovak Republic	1993	0	0	0	1	1	1	0	0	1
Slovak Republic	1994	0	0	0	1	1	1	0	0	2
Slovak Republic	1995	0	0	0	1	1	1	0	0	0
Slovak Republic	1996	0	0	0	1	1	1	0	0	1
Slovak Republic	1997	0	0	0	1	1	1	0	0	1
Slovak Republic	1998	0	0	0	1	1	1	0	0	2
Slovak Republic	1999	0	0	0	1	1	1	0	0	1
Slovak Republic	2000	0	0	0	1	1	1	0	0	0
Slovak Republic	2001	0	0	0	1	1	1	0	0	0
Slovak Republic	2002	0	0	0	1	1	1	0	0	0
Slovak Republic	2003	0	0	0	1	1	1	0	0	0
Slovak Republic	2004	0	0	0	1	1	1	0	0	1
Slovak Republic	2005	0	0	0	1	1	1	0	0	0



Country	Year	Dissolve	Remove	Budget	Proc	Final	Access	Review	Appoint	DeFacto
Slovak Republic	2006	0	0	0	1	1	1	0	0	0
Slovak Republic	2007	0	0	0	1	1	1	0	0	0
Slovak Republic	2008	0	0	0	1	1	1	0	0	0
Slovak Republic	2009	0	0	0	1	1	1	0	0	0
Slovak Republic	2010	0	0	0	1	1	1	0	0	0

Source: National Constitutions and United States Department of State Country Reports on Human Rights Practices

Dissolve = Constitutional protection against dissolution of the constitutional court. 0 = no protection in the constitution. 1 = protection against this action provided in the constitution.

Remove = Constitutional protection against the removal of constitutional court judges. 0 = no protection in the constitution. 1 = protection against this action provided in the constitution.

Budget = Constitutional protection allowing the constitutional court to determine its own budget. 0 = no protection in the constitution. 1 = protection against this action provided in the constitution.

Proc = Constitutional protection ensuring the constitutional court has control over its procedures. 0 = no protection in the constitution. 1 = protection against this action provided in the constitution.

Final = Constitutional protection preventing the override of constitutional court decisions. 0 = no protection in the constitution. 1 = protection against this action provided in the constitution.

Access = Access to the constitutional court. 0 = access to constitutional court limited. 1 = all citizens have access to the constitutional court.

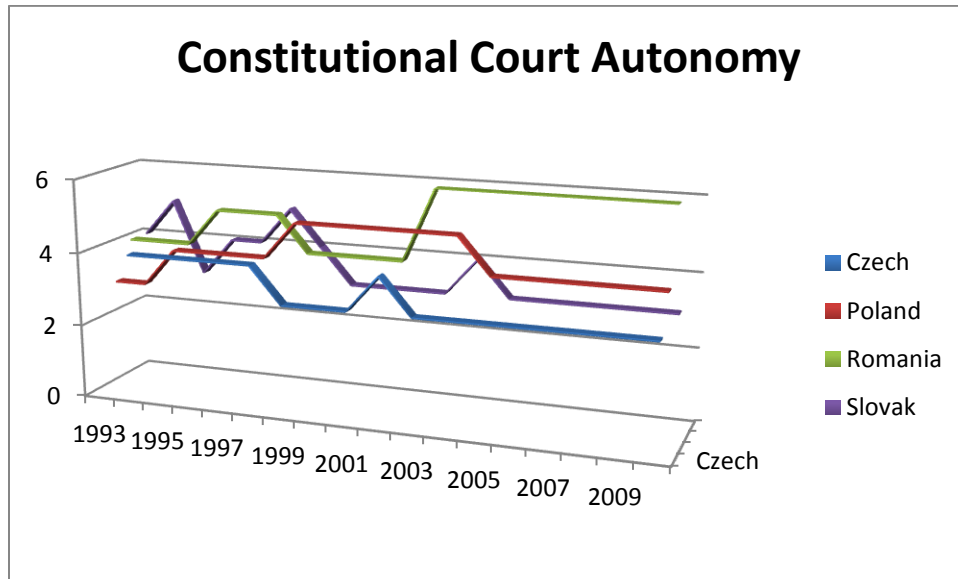
Review = Ability of the constitutional review legislation. 0 = limited review (either a posteriori or a priori). 1 = ability to review legislation at any time.

Appoint = Appointment of constitutional court judges. 0 = all constitutional court judges appointed by another branch. 1 = some constitutional court judges appointed by another branch. 2 = all constitutional court judges appointed by an independent body.

DeFacto = Autonomy of the constitutional court in action. 0 = constitutional court is ineffective or influenced by another branch. 1 = some limitations on the autonomy of the constitutional court reported. 2 = constitutional court is effective or no problems reported.

Figure 4.6 illustrates the total autonomy scores for the cases (Czech Republic, Poland, Romania, and Slovak Republic) from 1993 through 2010. Although this variable ranges from 0 (no autonomy) to 11 (full autonomy) the values for the cases range from 3 through 6. Thus, each of the constitutional courts demonstrates some degree of autonomy. Furthermore, the values fluctuate over time. The fluctuation results from changes in the constitutions as well as changes in the de facto assessment of

autonomy. The chart indicates that the Romanian Constitutional Court has the highest degree of autonomy while the Czech Constitutional Court has the least autonomy.



**Figure 4.6 Constitutional Court Autonomy**

Source: National Constitutions and United States Department of State Country Reports on Human Rights Practices

Summation of de jure (based on the national constitution) and de facto (based on the human rights reports) factors

Autonomy is the sum of the individual autonomy factors.

## 4.2 Analysis

With the variables defined, analysis of the first hypothesis, that increasing constitutional court autonomy increases the protection of human rights, can proceed. Table 4.3 presents the scores for constitutional court autonomy and CIRI human rights.

**Table 4.3 Total CIRI and Autonomy Scores**

Country	Year	CIRI	Autonomy
Czech Republic	1994	20	4
Czech Republic	1995	19	4
Czech Republic	1996	23	4
Czech Republic	1997	22	4
Czech Republic	1998	21	4

Country	Year	CIRI	Autonomy
Czech Republic	1999	24	3
Czech Republic	2000	21	3
Czech Republic	2001	22	3
Czech Republic	2002	21	3
Czech Republic	2003	21	3
Czech Republic	2004	20	3
Czech Republic	2005	18	3
Czech Republic	2006	19	3
Czech Republic	2007	21	3
Czech Republic	2008	21	3
Czech Republic	2009	21	3
Czech Republic	2010	21	3
Poland	1993	20	3
Poland	1994	20	3
Poland	1995	19	4
Poland	1996	20	4
Poland	1997	22	4
Poland	1998	22	4
Poland	1999	22	5
Poland	2000	20	5
Poland	2001	19	5
Poland	2002	21	5
Poland	2003	19	5
Poland	2004	19	5
Poland	2005	18	4
Poland	2006	18	4
Poland	2007	20	4
Poland	2008	19	4
Poland	2009	18	4
Poland	2010	20	4
Romania	1993	20	4
Romania	1994	16	4
Romania	1995	16	4
Romania	1996	18	5
Romania	1997	15	5
Romania	1998	18	5
Romania	1999	17	4
Romania	2000	16	4

Country	Year	CIRI	Autonomy
Romania	2001	17	4
Romania	2002	17	4
Romania	2003	18	6
Romania	2004	15	6
Romania	2005	14	6
Romania	2006	14	6
Romania	2007	14	6
Romania	2008	13	6
Romania	2009	15	6
Romania	2010	14	6
Slovak Republic	1993	21	4
Slovak Republic	1994	22	5
Slovak Republic	1995	18	3
Slovak Republic	1996	19	4
Slovak Republic	1997	19	4
Slovak Republic	1998	22	5
Slovak Republic	1999	21	4
Slovak Republic	2000	18	3
Slovak Republic	2001	18	3
Slovak Republic	2002	20	3
Slovak Republic	2003	19	3
Slovak Republic	2004	22	4
Slovak Republic	2005	22	3
Slovak Republic	2006	20	3
Slovak Republic	2007	21	3
Slovak Republic	2008	17	3
Slovak Republic	2009	18	3
Slovak Republic	2010	19	3

CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Autonomy Source: National Constitutions and United States Department of State Country Reports on Human Rights Practices

This hypothesis

The variables used in this hypothesis are ordinal variables. The numeric assessment of constitutional court autonomy and human rights protections allow identification of whether there is more or less of the characteristic, but there is no way to determine how much more or less.

Consequently, the statistic must be appropriate for ordinal measures. In addition, there are only two variables, constitutional court autonomy, and protection of human rights. Therefore, the statistic used must also be appropriate for a binomial hypothesis.

A commonly used statistical measure is a correlation coefficient, such as Pearson  $r$ . Although correlation coefficients measure the strength of the relationship between two variables, they are best suited to assessments of interval data with more than two variables (Hill and Lewicki, 2005). Statics such as Kendall's tau, gamma, and Somer's  $d$  are appropriate for binomial equations using ordinal variables (Johnson et al, 2001). Since this hypothesis is binomial, contains a clearly identified dependent variable, and the values are at least ordinal Somer's  $d$  is an appropriate measure (Johnson et al, 2001; Hill and Lewicki, 2005).

The Somer's  $d$  statistic, calculated on the dependent variable of protection of human rights, is  $-.340$  with a significance of  $.002$ . Somer's  $d$  values range from  $-1.000$ , indicating a perfect negative relationship, to  $1.000$ , indicating a perfect positive relationship (Johnson et al, 2001). A Somer's  $d$  value of  $0$  indicates no relationship (Johnson et al, 2001). Consequently, a value of  $-.340$  indicates that the relationship between constitutional court autonomy and protection of human rights is weak and negative. In other words, as constitutional court autonomy decreases the protection of human rights increases.

This finding is directly opposite the expected result in the hypothesis. The hypothesis posits a positive relationship between constitutional court autonomy and protection of human rights. More information about the relationship between the two variables is necessary to understand the unexpected results. Since constitutional court autonomy is comprised of multiple factors, unpacking this variable provides insight into the aspects of constitutional court autonomy affecting the protection of human rights.

Looking at the data in Table 4.2 several differences between countries are seen which impact the findings. First, only Romania has clear constitutional protections against the dissolution of the Constitutional Court and removal of the judges. Second, Romania is also the only country a clear constitutional protection ensuring the constitutional court sets its own budget. Third, the Slovak Republic is the only country with constitutional protections ensuring the constitutional court sets its own procedures. Fourth, Romania is the only country with constitutional limits on access to the constitutional courts. Finally, Romania and Poland both had periods when constitutional court decisions could be overturned. Yet these are the only countries that allow constitutional court review at any time. In addition, these conditions either remain constant through the period under review or change once during the period. A review of the de facto autonomy values indicate that they change infrequently as well.

Collapsing the records into occurrences where there is a change in the independent variables results in a small number of occurrences. Table 4.4 below displays the condensed cases. Combining the cases illustrates several key points in the data. The highest average CIRI scores occur with the greatest amount of de facto constitutional court autonomy. When the de facto score is 2 (reports indicate the constitutional court was effective and there were no incidences of its being influenced by other branches) the average CIRI score is above 20. When the de facto score is 0 (reports indicate the constitutional court was ineffective or influenced by other branches) the average CIRI score is below 20. However, a de facto score of 1 (reports indicate concerns with constitutional court autonomy) returns mixed results. Consequently, other factors influence the CIRI score.

**Table 4.4 Condensed Cases**

Country	Year	Org	Proc	Access	Review	Final	DeFacto	Avg CIRI
Czech Republic	1998	0	0	1	0	1	2	21
Czech	2010	0	0	1	0	1	1	20.83333

Country	Year	Org	Proc	Access	Review	Final	DeFacto	Avg CIRI
Republic								
Poland	1994	0	0	1	1	0	1	20
Poland	1998	0	0	1	1	0	2	20.5
Poland	2004	0	0	1	1	1	2	20.27273
Poland	2010	0	0	1	1	1	1	18.85714
Romania	1995	1	0	0	1	0	0	18
Romania	1998	1	0	0	1	0	1	16.75
Romania	2002	1	0	0	1	0	0	17
Romania	2010	1	0	0	1	1	1	15.94444
Slovak Republic	1993	0	1	1	0	1	1	21
Slovak Republic	1994	0	1	1	0	1	2	22
Slovak Republic	1997	0	1	1	0	1	1	18.66667
Slovak Republic	1998	0	1	1	0	1	2	22
Slovak Republic	2010	0	1	1	0	1	0	19.58333

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Proc: Ability of Constitutional Court to set its own processes

Access: Access to the Constitutional Court

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

De Facto: De Facto Constitutional Court autonomy

Avg. CIRI: Average CIRI score

Four of the cases (Poland 2010, Romania 2010, Slovak 1997, and Slovak 2010) have average CIRI scores below 20 and the lowest for the country. In the cases of Poland and Romania, the low average CIRI scores occur with a low de facto autonomy although the same de facto autonomy scores are associated with higher average CIRI scores in other years. The constitutions in both Poland and Romania changed to ensure the finality of constitutional court decisions. The average CIRI scores in both countries declined after this change irrespective of de facto autonomy. In the case of the Slovak Republic, both average CIRI scores under 20 are associated with low de facto autonomy, although the

higher of the two scores occurs with the poorest de facto autonomy score. The Slovak Republic is also the only country with protections in the constitution ensure the constitutional court's ability to set its own processes. Finally, Romania has the lowest average CIRI scores of all cases. This is also the only country with clear constitutional protections against the dissolution of the constitutional court, removal of constitutional court judges, and the ability of the constitutional court to set its own budget.

Reviewing the impact of these individual factors provides more insight into the influence different aspects of judicial autonomy have on the relationship between human rights protections and the constitutional court. However, consideration of one additional factor is required; the economy. The relationship between the economy and judicial protections of human rights in these cases is unclear. Research indicates a statistically significant relationship between de facto judicial independence and gross domestic product (GDP) (Howard and Carey, 2004). Yet post-communist countries had different experiences with liberal democracy, including individual rights, and the associated economy (Dryzek and Holmes, 2002). For example, although the Czech Republic was familiar with liberal democracy and economy, the Romanian economy struggled and the citizens were less committed to democratic values (Dryzek and Holmes, 2002). In addition, an informal economy and reluctance to pursue legal protection of rights, including economic rights, prevailed in many post-communist countries (Sajo, 1995). Judicial reforms, necessary in the post-communist transition, were more successful in an economy that benefitted all classes (Stanton, Reenock, and Radean, 2010). Research indicates that this resulted from the realization of the benefits provided by judicial protections (Hirschl, 2004). As the reforms became entrenched, and the economy improved, governments realized the benefits and saw increasing costs to violating judicial independence (Stanton, Reenock, and Radean, 2010). Further, research argues that governments prioritize economic development over human rights (Evans, 2001). Consequently, it is possible that the economy influences both constitutional court autonomy and human rights in different ways. For example, it is plausible that the economy's impact on judicial autonomy and human rights



fluctuates as cases transition to a liberal democracy, develop a market economy, and reform their judiciary.

Table 4.5 presents the compressed results with the corresponding average GDP. Romania, with the lowest human right scores, also has the lowest average GDPs. However, in 2010 both the GDP and de facto constitutional court autonomy scores are highest while the human rights score is the lowest. A similar situation occurs in Poland. In the Czech Republic, both de facto constitutional court autonomy and human rights decrease although GDP increases. Consequently, although the economy appears have an impact on constitutional court autonomy and human rights other factors are also important.

**Table 4.5 Constitutional Court Autonomy, GDP, and Human Rights**

Country	Year	Org	Proc	Access	Review	Final	DeFacto	Avg CIRI	GDP
Czech Republic	1998	0	0	1	0	1	2	21	15202.14
Czech Republic	2010	0	0	1	0	1	1	20.83333	19741.26
Poland	1994	0	0	1	1	0	1	20	8037.679
Poland	1998	0	0	1	1	0	2	20.5	9676.241
Poland	2004	0	0	1	1	1	2	20.27273	11864.67
Poland	2010	0	0	1	1	1	1	18.85714	15324.61
Romania	1995	1	0	0	1	0	0	18	6465.084
Romania	1998	1	0	0	1	0	1	16.75	6895.211
Romania	2002	1	0	0	1	0	0	17	7106.304
Romania	2010	1	0	0	1	1	1	15.94444	9927.918
Slovak Republic	1993	0	1	1	0	1	1	21	9147.799
Slovak Republic	1994	0	1	1	0	1	2	22	9682.354
Slovak Republic	1997	0	1	1	0	1	1	18.66667	10831.08
Slovak Republic	1998	0	1	1	0	1	2	22	11850.75
Slovak Republic	2010	0	1	1	0	1	0	19.58333	15005.91

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Proc: Ability of Constitutional Court to set its own processes

Access: Access to the Constitutional Court

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

De Facto: De facto Constitutional Court autonomy

Avg. CIRI: Average CIRI score .

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

These observations, while not conclusive on their own, allow further testing of the hypothesis to focus on conditions that vary with human rights protections. These are GDP, de fact autonomy, finality of constitutional court decisions, constitutional protections against constitutional court dissolution, and constitutional protections against judge removal, and constitutional protections to ensure the constitutional court can set its own budget and processes. The next step is to include these conditions in a more rigorous statistical test of the hypothesis.

The statistical method must accommodate two conditions in the data: the data is ordinal and measured yearly. The exception to the ordinal data is GDP. To ensure consistency in data types the GDP is converted to categories based on the following scale: 0 is under 5000, 1 is 5000 to 10000, 2 is 10000 to 15000, 3 is 15000 to 20000, and 4 is over 20000. Due to the yearly observances of the data, a change one year could also reflect in a future year (Studenmund, 2010). Both de facto autonomy and the CIRI measures reflect events that occur during a particularly year (Cingranelli and Richards, 2008). The GDP also reflects the activity of the year indicated. With the exception of the variable indicating the finality of constitutional court decisions, there is no change to the variables during the time studied. However, it is possible that when the finality of constitutional court decisions changes the impact occurs a year in the future. Consequently, the calculation of this variable accommodates a one-year lag.

To accommodate both the yearly measures and ordinal nature of the data the statistical method used in panel ordered logit regression. The reason this data is panel data as opposed to time series data is that the observances occur yearly but are not a yearly pattern (Torres-Reyna). This data consists of

individual observations recorded on a yearly basis. There is no inherent cyclical information. Time series data, on the other hand, anticipates cyclical information that allows forecasting (Torres-Reyna).

The results of the panel ordered logit regression appear in table 4.6. This illustrates that all variables except the GDP and Process (i.e. constitutional protections to ensure that the constitutional court controls its process) are statistically significant at the  $p < .005$  levels. In this model with the limited data, neither GDP nor constitutional process protections are statistically significant nor do changes in their values have significant impacts. In both cases, a change in the value of the independent variable has less than a one point change in the CIRI human rights value. The statistically significant impact of de jure constitutional court autonomy is expected. Interpreting the coefficient indicates that improving de facto constitutional court autonomy increases the CIRI human right measures by approximately 1.5 points. The remaining three variables have a greater, albeit reversed, impact on human rights. Greater ability of the constitutional court to review data decreases the CIRI human rights value by more than 2.6 points. Increasing constitutional protections for the finality of constitutional court decisions decreases the CIRI human rights value by 3.7 points. Providing increased constitutional protections against the removal of constitutional court judges and the dissolution of the court decreases CIRI human rights by almost 5 points. In other words, for these cases increased constitutional protections for the autonomy of the constitutional court does not result in increased human rights protections.

**Table 4.6 Results of Ordinal Logit Regression**

	Coefficient	Error	Significance
GDP	0.492	0.472212	0.298
Org	-4.922	1.164702	0.000
Process	0.202	0.982849	0.837
Finality (lagged)	-3.711	0.822199	0.000
Review	-2.643	0.843558	0.002
De Facto	1.481	0.492877	0.003
Chi-Square	50.590		0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Finality: Finality of Constitutional Court Decisions

De Facto: De facto Constitutional Court autonomy

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

This regression uses the overall GDP, which measures a country's wealth but not the actual wealth of the citizens. A more accurate measure is the GDP per capita, which divides the overall wealth by the number of citizens.<sup>37</sup> Research determined that human rights violations, particularly those impacting physical integrity, occur more frequently in cases of poverty (Ahnen, 2007). Table 4.7 displays the results, which are the same as the results in Table 4.6. This is not surprising given the close proximity and similar history of the countries involved.

**Table 4.7 Results of Ordinal Logit Regression with GDP per capita**

	Coefficient	Error	Significance
GDP per capita	0.492	0.472212	0.298
Org	-4.922	1.164702	0.000
Process	0.202	0.982849	0.837
Finality (lagged)	-3.711	0.822199	0.000
Review	-2.643	0.843558	0.002
De Facto	1.481	0.492877	0.003
Chi-Square	50.590		0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Finality: Finality of Constitutional Court Decisions

De Facto: De facto Constitutional Court autonomy

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

N = 71

<sup>37</sup> Based on the World Bank definition of GDP per capita available at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed February 27, 2014

One other way of looking at the data is the odds ratio as reported in Table 4.8. This tells us that de facto judicial independence has the biggest impact. The country's human rights score is almost 4.4 times more likely to improve as de facto constitutional court independence improves. Per capita GDP and judicial process increase the odds of country's human rights score improving by 1.635 and 1.224 respectively. Having small impacts are the finality of constitutional court decision and the timing of the constitutional court's review of legislation since the odds of them improving human rights are less than 0.01. The smallest odds of improvement are in the ORG variable, which considers the constitutional court's control over its budget and ability to remove judges, and protection against dissolution of the constitutional court.

**Table 4.8 Odds Ratio Results of Ordinal Logit Regression with GDP per capita**

	Odds Ratio	Error	Significance
GDP per capita	1.635	0.7719756	0.298
Org	0.007	0.0084862	0.000
Process	1.224	1.202545	0.837
Finality (lagged)	0.024	0.0203794	0.000
Review	0.071	0.0599885	0.002
De Facto	4.398	2.167496	0.003
Chi-Square	50.590		0.000

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Finality: Finality of Constitutional Court Decisions

De Facto: De facto Constitutional Court autonomy

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table>  
accessed January 14, 2014

N = 71

A Hausman-Taylor estimation, presented in Table 4.9 below, provides further insight into this data. This estimation illustrates that the ability to dissolve the constitutional court, remove judges, and constitutional court control of its budget are time invariant exogenous. In other words, there is no point in the time period included in the study where this variable has a causal link to any other variable in the

model.<sup>38</sup> The variable Final, measuring the finality of constitutional court decisions, is time varying exogenous. GDP, on the other hand, has a time varying causal link to other variable in the model. Using this estimation also changes the significance and impact of the variables. GDP is less statistically significant and has a small negative impact. The Org variable remains statistically significant at the  $p < .001$  level but has a slightly smaller impact. Process, while still not statistically significant, is slightly more significant but in an opposition direction. Finality remains statistically significant but at the slightly lower  $p < .01$  level. Furthermore, the impact is less than the original model. Review is slightly more significant at the  $p < .001$  level and has almost the same impact. De facto independence is no longer statistically significant and has a smaller impact.

**Table 4.9 Hausman-Taylor Estimation**

	Coefficient	Error	Significance
Time Varying			
Exogenous			
Final	-1.626	0.6275359	0.007
Time Varying			
Endogenous			
GDP	0.000	0.0000852	0.444
De Facto	0.575	0.3816007	0.132
Time Invariant			
Exogenous Org	-3.918	0.7179719	0.000
Process	-0.955	0.7877457	0.225
Review	-2.228	0.6325352	0.000

Chi-Square      141.060      0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Org: Ability to dissolve the Constitutional Court, Remove Judges, and Budget.

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Finality: Finality of Constitutional Court Decisions

De Facto: De facto Constitutional Court autonomy

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

N = 71

<sup>38</sup> See discussion of exogenous variable at <http://www-personal.umd.umich.edu/~delittle/Encyclopedia%20entries/exogenous%20variable.pdf> accessed April 17, 2014.

Although this information is helpful in assessing the hypothesis, that increasing constitutional court autonomy increases the protection of human rights, these are a limited number of cases that are, in many ways, homogenous. A better assessment of this hypothesis requires additional cases.

### 4.3 Expanded Assessment

When identifying additional cases several conditions limit the cases and data. To ensure consistency with the cases already discussed the period under consideration is 1994 through 2010. Similarly, the countries included must have constitutional courts. As mentioned above, many levels of national courts adjudicate human rights and constitutional issues. The primary focus of constitutional courts, however, is constitutional issues. Furthermore, to ensure a consistent measurement of human rights the country must have CIRI human rights data for the period assessed. Similarly, GDP data must be available from the Penn World Tables for the period to ensure consistency.

Although this limits data to some extent, it also greatly expands the range of cases. The data now includes cases from all areas of the world. It includes countries outside the influence of the European Union. It encompasses various political systems since Cambodia, Thailand, and the United Arab Emirates are included. It also includes established and newly formed constitutional courts. For example, the constitutional court of Germany predates 1994 but the constitutional court of Georgia began in 1996 and Indonesia's began in 2002. Finally, the data includes countries with a reputation for human rights protections, such as Germany and Belgium, as well as countries reputed to violate human rights, such as Egypt and Syria.

The methods used to compile this additional data followed the procedures used for the original four cases. A review of constitutions for each country in the CIRI dataset identified those countries with constitutional courts. These constitutions also provided the information to populate the constitutional measures of constitutional court autonomy. If the constitution changed, due to either amendment or creation of a new constitution, the values assigned to the measures changed when appropriate. Reports from the United States Department of State provided the measures for de facto autonomy. GDP values are from the Penn World table.



As noted above, the individual autonomy variables differed in their relationship with the protection of human rights. Consequently, this test of the hypothesis uses the individual measures of de jure constitutional court autonomy rather than the composite score. In addition, the polity score is also included as an additional control measure. Unlike previous tests of the hypothesis, not all of the countries included are democracies under the influence of the European Union, an institution known for protection of human rights (Koopmans, 2003) and pre-accession monitoring (Albi, 2009). Furthermore, research demonstrates a link between protection of human rights and regime type (Poe and Tate, 1994). Since the polity score measures the regime type the model uses it to control for variance in regime introduced with the increased number of cases. Once again, the statistical calculation used is panel ordered logistic regression.

The first panel ordered logistic regression uses the combined constitutional autonomy (i.e. de jure autonomy) scored lagged one year. The lag accommodates the fact that constitutional changes affect future years. Table 4.10 displays the results of this regression. All variables except the constitutional protections (i.e. de jure autonomy) are statistically significant at the  $p < .001$  level. However, the impact of each variable is minimal with a change altering the CIRI human rights score by less than a point. Of interest is the fact that the GDP and constitutional protection variables display a negative relationship with human rights.

**Table 4.10 Results of Ordinal Logit Regression with Expanded Cases**

	Coefficient	Error	Significance
GDP	-0.474	0.1348783	0.000
Polity	0.032	0.0060576	0.000
De Facto	0.997	0.1404048	0.000
Constitutional	-0.102	0.0060576	0.385
Chi-Square	92.20		0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

Constitutional: De jure constitutional court autonomy

N = 1019

Once again, a measure of the economy that better reflects individuals requires consideration.

Table 4.11 presents the regression using GDP per capita rather than overall GDP. In this case, the results are different. Although GDP per capita retains the negative relationship, it is no longer statistically significant. De jure constitutional court autonomy (the Constitutional variable) remains negatively related to human rights. Although its statistical significance increased, it is still not statistically significant. Polity and de facto constitutional court autonomy remain statistically significant. De facto constitutional court autonomy has the largest impact on human rights with a one-point change resulting in a one-point change in human rights. A one-point change in the other variables results in less than two tenths of a change in human rights.

**Table 4.11 Results of Ordinal Logit Regression with Expanded Cases with GDP per capita**

	Coefficient	Error	Significance
GDP per capita	-0.105	0.1733242	0.544
Polity	0.031	0.006069	0.000
De Facto	1.019	0.1402994	0.000
Constitutional	-0.173	0.1159656	0.136

Chi-Square            80.350                            0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

Constitutional: De jure constitutional court autonomy

N = 1019

Once again, it is also informative to look at the odds ratio calculations displayed in Table 4.12. The odds ratios reflect the impact of both de facto constitutional court autonomy and polity. As the country's de facto constitutional court autonomy increases, it is almost 3 times more likely to have improved human rights. Similarly, countries with strong democracies are more likely to have improved human rights. Constitutional protections for constitutional courts and GDP per capita increase the likelihood of improved human rights by less than one.

**Table 4.12 Odds Ratio with Expanded Cases with GDP per capita**

	Odds Ratio	Error	Significance
GDP per capita	0.900	0.156024	0.544
Polity	1.031	0.0062593	0.000
De Facto	2.771	0.3887336	0.000
Constitutional	0.841	0.0975453	0.136

Chi-Square      80.35      0.000

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table>  
accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January  
14, 2014

De Facto: De facto Constitutional Court autonomy

Constitutional: De jure constitutional court autonomy

N = 1019

Based on the analysis it appears that there is no statistically significant relationship between the constitutional protections ensuring the autonomy of the constitutional court and the protection of human rights at a statistically significant level. However, as mentioned above, with the expansion of cases there is more variation in the individual components of the independent variable. Consequently, although the total package of constitutional protections are not statistically significant, it is possible that one or more of the components has a statistically significant influence. Based on the first regression above, the model does not include the Appoint and Access variables since they are, at least in some cases, collinear. Running a panel ordered logistical regression with each of the variables, lagged to accommodate a delayed influence, indicates that this is the case. The results appear in Table 4.13. As with the last regression, GDP, Polity, and De Facto autonomy are statistically significant and the relationship between GDP and human rights is negative. Of the three variables, de jure autonomy has the largest impact; one point increase in de jure autonomy increases human rights by over 1 point. Constitutional protections against dissolution of the constitutional court, the court's budget autonomy, the finality of decisions, and the timing of the court's review of legislation are not statistically significant. There is a negative relationship between constitutional protections against the removal of constitutional court judges and CIRI human rights. An increase in constitutional protections decreases CIRI human rights by 1.181 points. This is statistically significant at the  $p < .05$  level. Conversely, the relationship between constitutional protections ensuring the court's autonomy over its processes is positive and statistically significant at the  $p < .005$  level. An increase in these protections increases the CIRI human rights score by 1.67 points.

**Table 4.13 Results of Ordinal Logit Regression with Expanded Cases and Variables**

	Coefficient	Error	Significance
GDP	-0.498	0.134432	0.000
Polity	0.032	0.006101	0.000
De Facto	1.024	0.141385	0.000
Dissolve	0.850	1.041037	0.414
Removal	-1.181	0.547777	0.031

Budget	-1.094	0.681088	0.108
Process	1.672	0.607109	0.006
Final	0.332	0.307649	0.280
Review	-0.286	0.331982	0.388

Chi-Square            104.940                      0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at  
<http://ciri.binghamton.edu/> accessed December 30, 2012

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

Dissolve: Constitutional protection against dissolution of the constitutional court

Removal: Constitutional protection against removal of constitutional court judges

Budget: Constitutional protection ensuring the constitutional court sets its own budget

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

N = 1019

Table 4.14 tests the data with GDP per capita as opposed to overall GDP. With the expanded number of cases, and expanded range of experiences and economies, there is a change in the results. The negative relationship between human rights, lack of protections against removing constitutional court judges (Removal), lack of protections for the constitutional court to control its own budget (Budget), timing of judicial review (Review), and GDP per capita remain. Two variables, GDP per capita and the constitutional protections that the constitutional court controls its own procedures (Process), are less significant in this model. While the Process variable remains statistically significant at the  $p < .05$  level, GDP per capita is not statistically significant. The statistical significance of the timing for constitutional court review (Review), finality of constitutional court decisions (Final), constitutional protections for the court to control its budget (Budget), and constitutional protections against the dissolution of the constitutional court (Dissolve) increase in this model although none are statistically significant at the  $p < .05$  level. The Polity score, de facto constitutional court autonomy, and constitutional protections against removal of constitutional court judges (Remove) remain statistically significant at the  $p < .05$  level. The impact of the Polity score, constitutional protections ensuring the court controls its own budget (Budget), constitutional protections ensure the court controls its own procedures (Process), and timing of constitutional court review (Review) is less in this model. However, the impact of the other variables increases.

**Table 4.14 Ordinal Logit Regression with Expanded Cases and Variables using GDP per capita**

	Coefficient	Error	Significance
GDP per capita	-0.190	0.1765207	0.281
Polity	0.030	0.0060973	0.000
De Facto	1.045	0.14155	0.000
Dissolve	1.093	1.045963	0.296
Removal	-1.166	0.5402945	0.031
Budget	-1.141	0.6747988	0.091
Process	1.504	0.6019878	0.012
Final	0.372	0.3088771	0.229
Review	-0.453	0.3290194	0.168

Chi-Square            92.860                            0.000

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn->

world-table accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

Dissolve: Constitutional protection against dissolution of the constitutional court

Removal: Constitutional protection against removal of constitutional court judges

Budget: Constitutional protection ensuring the constitutional court sets its own budget

Process: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

N = 1019

Finally, the odds ratios provide further insight into the impact of the variables. Table 4.15 shows that constitutional protections ensuring the constitutional court controls its own procedures (Process) has greatest odds of increase human rights protections. Both de facto constitutional court autonomy and constitutional protections against dissolution of the constitutional court (Dissolve) have the next greatest odds of increase human rights protections. Constitutional protections against removal of constitutional court judges (Removal) and ensuring the constitutional court controls its own budget (Budget) have the smallest odds of increasing human rights protections.

**Table 4.15 Odds Ratio with Expanded Cases and Variables using GDP per capita**

	Odds Ratio	Error	Significance
GDP per capita	0.827	0.1459126	0.281
Polity	1.031	0.0062854	0.000
De Facto	2.844	0.4026148	0.000
Dissolve	2.982	3.118796	0.296
Removal	0.312	0.1684302	0.031
Budget	0.319	0.2154902	0.091
Process	4.499	2.708595	0.012
Final	1.450	0.4479106	0.229
Review	0.635	0.2090792	0.168
Chi-Square	92.860		0.000

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

Dissolve: Constitutional protection against dissolution of the constitutional court  
 Removal: Constitutional protection against removal of constitutional court judges  
 Budget: Constitutional protection ensuring the constitutional court sets its own budget  
 Process: Ability of Constitutional Court to set its own processes  
 Review: Timing of Constitutional Court Review  
 Final: Finality of Constitutional Court Decisions  
 N = 1019

#### 4.4 Corollaries

The above regressions indicate a negative relationship between human rights and GDP as well as GDP per capita. However, this finding is inconsistent with existing research (Howard and Carey, 2004). Consequently, three corollaries test the interrelationship of the data. The first is that *the higher the GDP the greater de jure constitutional court autonomy*. This builds on Sweet's work (2005) arguing that markets value the autonomy of courts to protect their rights. Since this is measuring GDP rather than an ordinal representation thereof, a regression with panel-corrected standard errors is used. Since this method accommodates heteroscedasticity or the unequal variability inherent in comparing economics and constitutions.<sup>39</sup> Table 4.16 presents the results from the regression. Although the attempt to compare GDP and de facto constitutional court autonomy results in large coefficients, it does indicate a statistically significant relationship for all variables. Both constitutional protections against the dissolution of the court and the finality of decisions have a negative relationship with GDP. As the R square value indicates this regression has little explanatory power since it accounts for only 4% of the variance.

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<sup>39</sup> Based on definitions and examples at Confusing Stats Terms Explained: Heteroscedasticity (Heteroskedasticity) available at <http://www.statmakemecry.com/smmctheblog/confusing-stats-terms-explained-heteroscedasticity-heteroske.html> accessed February, 27, 2014.



**Table 4.16 Results of Regression of De Facto Constitutional Court Autonomy and GDP**

	Coefficient	Error	Significance
Dissolve	-401656.0	54342.28	0.000
Remove	208356.3	18468.5	0.000
Budget	213936.9	32757.7	0.000
Procedures	17938.4	189196.17	0.015
Final	-149699.5	18196.17	0.000
Access	29412.0	7865.737	0.000
Review	2959.8	10351.33	0.005
Constant	272624.3	16700.12	0.000
R Square		0.0487	

Dependent Variable: GDP source: Penn World Table available at  
<http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Dissolve: Constitutional protection against dissolution of the constitutional court  
 Removal: Constitutional protection against removal of constitutional court judges  
 Budget: Constitutional protection ensuring the constitutional court sets its own budget  
 Procedures: Ability of Constitutional Court to set its own processes  
 Review: Timing of Constitutional Court Review  
 Final: Finality of Constitutional Court Decisions  
 N = 1019

The second corollary is that *as democracy increases de facto constitutional court autonomy increases*. This corollary tests the relationship between democracy and constitutional court autonomy. Table 4.17 presents the results of the regression. Three variables, protections against the removal of constitutional court judges (Remove), protections ensure that the constitutional court sets its own budget (Budget), and the finality of constitutional court decisions (Final) are not statistically significant. All other variables are significant at the  $p < .05$  level. Two variables, the finality of constitutional court decisions (Final) and the timing of the court's review (Review) have a negative relationship with Polity. The largest impact is protections against the dissolution of the constitutional court (Dissolve) where a one-point change in the variable's value changes the polity score by almost 10 points. Broad access to the constitutional court (Access) also has a large impact where a one-point change increases the polity score by almost 7 points. The smallest impact is protection against removal of constitutional court judges (Remove) since a one-point change alters the polity score by less than one point. This model also has a limited impact since it explains only 5% of the variance.

**Table 4.17 Results of Regression of De Facto Constitutional Court Autonomy**

	Coefficient	Error	Significance
Dissolve	9.916	1.284509	0.000
Remove	0.527	0.4905154	0.283
Budget	1.337	0.7221524	0.064
Procedures	3.305	0.5934971	0.000
Final	-0.921	0.6379584	0.149
Access	6.873	0.7063744	0.000
Review	-4.247	0.8213191	0.000
Constant	1.399	0.6295852	0.026

R Square 0.0504

Dependent Variable: Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm>  
accessed January 14, 2014

Dissolve: Constitutional protection against dissolution of the constitutional court

Removal: Constitutional protection against removal of constitutional court judges

Budget: Constitutional protection ensuring the constitutional court sets its own budget

Procedures: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

N = 1019

The third corollary is that *as de jure constitutional court autonomy increases de facto constitutional court autonomy increases*. This corollary looks at the relationship between de facto and de jure autonomy. Table 4.18 presents the results. Neither protections against dissolution of the constitutional court (Dissolve) nor the ability of the constitutional court to set its own procedures (Procedures) are statistically significant. All other variables are statistically significant at the  $p < .01$  level. Only broad access to the constitutional court (Access) and the ability of the constitutional court to set its own budget (Budget) have a positive relationship with de facto constitutional court autonomy. All other variables have a negative relationship meaning the greater de facto constitutional court autonomy the less de jure constitutional court autonomy. However, none of the variables have a large impact since a one value change in any of the results in less than a one value change in de facto constitutional court autonomy. This model does have a modest contribution since it explains 12% of the total variance.

**Table 4.18 Regression of De Facto and De Jure Constitutional Court Autonomy**

	Coefficient	Error	Significance
Dissolve	-0.086	0.1479495	0.560
Remove	-0.092	0.0288185	0.001
Budget	0.421	0.058319	0.000
Procedures	-0.014	0.0338358	0.687
Final	-0.321	0.0394463	0.000
Access	0.582	0.0422848	0.000
Review	-0.234	0.0248155	0.000
Constant	0.907	0.0287633	0.000

R Square 0.1281

Dependent Variable: De facto constitutional court autonomy

Dissolve: Constitutional protection against dissolution of the constitutional court

Removal: Constitutional protection against removal of constitutional court judges

Budget: Constitutional protection ensuring the constitutional court sets its own budget

Procedures: Ability of Constitutional Court to set its own processes

Review: Timing of Constitutional Court Review

Final: Finality of Constitutional Court Decisions

N = 1019

## 4.5 Discussion

The tests of the first hypothesis, that *increasing constitutional court autonomy increases the protection of human rights*, demonstrate that the relationship between the two variables is complicated. The three corollaries indicate a close relationship between the variables. Although the expanded data set provides more variance on all variables, the small data set of post-communist countries provides insight as well. While the tests revealed statistically significant relationships, the results prevent acceptance of the hypothesis. Four findings from these tests are relevant to the research question.

First, increased access to the constitutional court is neither necessary nor sufficient condition for the protection of human rights. This finding is consistent with the experience of the Constitutional Council in France (Koopmans, 2003). The French Constitutional Council protected human rights despite significant constitutional limitations on their jurisdiction (Koopmans, 2003).

Second, both de jure and de fact autonomy of the constitutional court are important to the protection of human rights. Testing of the third corollary indicated the close relationship between these features. This is consistent with the expectations of a constitutional court under the separation of powers model of government. Where government separates power across branches, there is an expectation that each branch will check the powers of the other branches thus preventing a usurpation of power (Federalist 51). Logically this cannot occur if the branches are not autonomous from one another. De jure constitutional court autonomy, in this study, measures the constitutional protections to ensure the autonomy of the constitutional court. De facto constitutional court autonomy is a measure of the actual freedom of the constitutional court to act without interference from the executive and legislative branches. Both are important to the protection of human rights. The more autonomous a constitutional court is the more it willing to overturn laws and government actions that violate human rights.

Third, there is a negative relationship between the timing of judicial review by the constitutional court and the protection of human rights. Constitutional courts can review laws either before

promulgation (a priori), after promulgation (a posteriori), or both. The national constitution controls the limits, if any, placed on the constitutional court's review. Although a priori review limits the ability of the constitutional court to correct problems once the law is in effect, it prevents laws that violate human rights from going into effect. The findings here indicate that constitutional courts limited to either a priori or a posteriori review are better able to protect human rights than constitutional courts with the ability to assess laws both before and after enactment. This is evident in the four cases. Both the Czech and Slovak Republics have limited review by the constitutional courts and higher human rights scores than Romania and Poland with unlimited constitutional court review.

Finally, there is a negative relationship between the constitutional protections against removal of constitutional court judges, as well as protection for the constitutional court to control its budget, and the protection of human rights. This indicates that the ability of a legislature or executive to have some leverage over the constitutional court provides a check on the constitutional court's ability to protect human rights. On its face, this finding seems to jeopardize the autonomy of the constitutional court. However, from a checks and balance perspective this finding seems logical. Constitutional courts check the powers of the executive and legislative branches (Solyom, 2003; Federalist 51). The power of the constitutional court purse strings provides a similar check on the constitutional court.

#### **4.6 Conclusion**

Testing of the first hypothesis, that *increasing constitutional court autonomy increases the protection of human rights*, results in less than full acceptance. However, the statistical assessment demonstrated factors associated with constitutional court autonomy that increases protections of human rights. The statistical assessment also identified factors where increased autonomy increase human rights protections as well as those where reduced autonomy increase human rights protections.

The next step is to assess the supranational influence on constitutional court. Therefore, the next chapter tests the second hypothesis, that *as supranational constraints intended to increase the*

*consolidation of democracy and protection of human rights increase, national constitutional courts  
increase constraints on national legislatures*

## 5 SECOND HYPOTHESIS

This chapter tests the second hypothesis, which looks at the impact of the supranational human rights efforts on the constitutional court's ability to affect legislative autonomy. Building on the work of Stone (1990) and Finnemore (2003), this hypothesis states that *as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures.*

Stone (1990) posits that constitutional courts in Europe have both a direct and indirect impact on legislatures (Stone, 1990). The direct influence of constitutional courts occurs when they overturn a law (Stone, 1990). However, when a legislature considers the potential of a constitutional court ruling when drafting a bill it is an indirect influence by the constitutional court (Stone, 1990). Indirect influence by the constitutional court over the legislature occurs in two ways. Legislatures can write legislation in a way to avoid having the constitutional court annulling the law. Alternately, the legislature may alter the intended legislation to prevent a challenge by a particular group.

Finnemore found an increasing legalization of international relations disputes (Finnemore, 2003). As a result, countries now adjudicate international disputes that previously resulted in armed conflict (Finnemore, 2003). A similar legalization is occurring in human rights, where there is a preference for legal over political solutions (Gearty, 2006). This allows an international legal conversation and activism about human rights (Gearty, 2006). The result is that human rights laws increase the scope and authority of courts at both the national and international level (Koopmans, 2003; Gearty, 2006).

Combing this research with the research on the increasing role of constitutional courts presented in Chapter 4 this dissertation posits that international constraints empower constitutional courts to constrain the majority tendencies of the legislature. Minorities facilitate this empowerment by

seeking legal protections against human rights violations contained in majority-enacted legislation (Koopmans, 2003).

## 5.1 Variables

The dependent variable is constitutional court constraints on national legislatures. The key independent variable is supranational constraints. Chapter 3 presents the definition of these variables. This section presents the operationalization of, or association of data with, the variables. Data collection includes the years 1994 through 2010 to ensure consistency throughout the dissertation.

### 5.1.1 *Constitutional Court Constraints on National Legislatures*

As described in Chapter 3 constitutional court constraints on national legislatures can include limitations on legislative actions, annulment of all or part of a law, instructions on the drafting of laws, and the threat of the constitutional court reviewing a law (Vanberg, 1998). The basis of measurement for this variable is Fish and Kroenig's (2009) measure of legislative autonomy. However, rather than the 32 items used by Fish and Kroenig (2009), this dissertation uses only the ability to overturn a constitutional court decision coded 1 if the legislature is not allowed to overturn constitutional court decisions and 0 otherwise.

Another measure of legislative autonomy is the ability of the constitutional court to exercise judicial review of legislation. However, for all four cases in this study the constitutional court has the power of judicial review. Therefore, since there is no variation on this variable it is not included here.

As with constitutional court autonomy, legislative autonomy has a de jure and de facto component. The de jure component, described above, is whether, the national constitution authorizes the legislature to overturn constitutional court decisions. The de facto component measures the ability of the constitutional court to influence the actual workings of the legislature. Legislative debates provide evidence of the constitutional court's influence in the legislature's primary function, the drafting



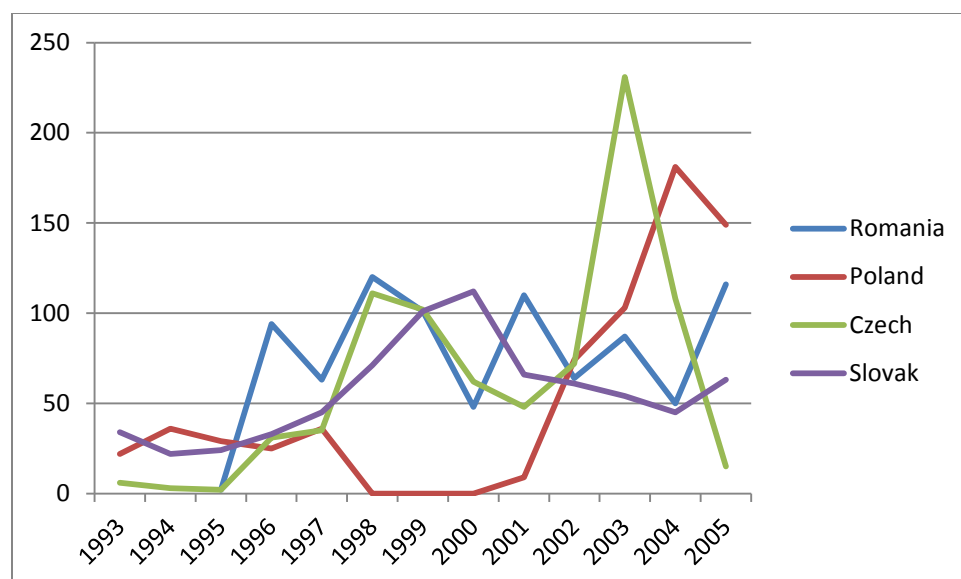
of legislation. Five types of comments during legislative debates indicate the constitutional court's de facto influence over the legislature. First are comments indicating consideration of past constitutional court decisions in the drafting of a law. These comments indicate that the legislature is confining itself to the rules established in past constitutional court decisions. A second type of comment indicates a consideration of future constitutional court review of legislation. Such comments indicate that the legislature is constraining its actions to protect the legislation against future constitutional court action. A third type of comment indicates the legislature is changing laws to conform to a constitutional court decision. Although these comments are similar to the first type, they indicate a more direct constraint since the legislature is responding to the instructions of the constitutional court. The fourth type of comment indicates that the legislature is seeking constitutional court advice on drafting legislation. Finally are comments that a group or party plans to challenge the law at the constitutional court. This is not a direct impact on the legislature by the constitutional court. However, it is an indirect limit on the legislature's autonomy since the legislature must at least weigh the consequences of the threat of constitutional court action.

These five types of comments indicate different amounts of constitutional court influence over the legislature. Changing existing laws to conform to constitutional court decisions is the most direct influence. Consideration of past decisions when drafting new legislation and consulting the constitutional court when drafting legislation also indicate direct influence of the constitutional court. All three situations indicate that the legislature considering, if not following, guidelines the constitutional court included in its decisions. The other two types of comments are more indirect since their basis is a threat of future action. In these situations, the legislature can choose to ignore the threat of constitutional court review. However, even if they choose to ignore the threat, the need to consider the threat limits the legislature's autonomy.

Some references to the constitutional court in legislative debates are outside these categories. For example, discussions on nominations to the constitutional court or comments on the number of constitutional court cases for a particular year do not involve the legislature's lawmaking activities. Therefore, comments during such debates are not included in the data. Coding only occurs for comments directly related to the lawmaking activities of the legislature. Furthermore, some debates have multiple comments related to the constitutional court. In these cases, the assigned code reflects the greatest degree of influence. For example, if a debate includes comments about past decisions and a threat to take the law to the constitutional court the code for the debate reflects the consideration of past decisions.

The value for the de facto component recognizes the difference in impact on the legislature's autonomy. If there are no comments about the constitutional court in a debate the debate is not included. When a group threatens to take action at the constitutional court, the debate has a value of 1. When the comments indicate that the legislature seeks advice from the constitutional court, the debate has a value of 2. The value of 3 indicates consideration of constitutional court decisions as legislation is debated. When the comments indicate concern for potential constitutional court cases, the value is 4. Finally, the value is 5 when the comments indicate legislation is changed to conform with constitutional court decisions.

Figure 5.1 shows the values for de facto component of constitutional court constraints on the national legislature by country by year. This figure illustrates the significant variance within and across countries. The one commonality across countries is the low values prior to 1998. All countries except Poland saw an increase between 1998 and 2001. Poland saw an increase beginning in 2003.



**Figure 5.1 De Facto Constitutional Court Constraints on the Legislature by Country by Year**

The calculation of these values occurs yearly. The debates represent a summation of the values for debates during the year. Therefore, for each year the values range from 0 (no de facto impacts of the constitutional court on the legislature's autonomy) upward. Table 5.1 presents the values for each country by year. This table illustrates the variance in references to the constitutional court within and across countries.

**Table 5.1 Values for Constitutional Court Constraints by Country by Year**

Country	Year	Jud Rev	Debate	Total
Czech Republic	1994	1	0	1
Czech Republic	1995	1	0	1
Czech Republic	1996	1	13	14
Czech Republic	1997	1	15	16
Czech Republic	1998	1	5	6
Czech Republic	1999	1	0	1
Czech Republic	2000	1	0	1
Czech Republic	2001	1	0	1
Czech Republic	2002	1	2	3
Czech Republic	2003	1	1	2
Czech Republic	2004	1	0	1
Czech Republic	2005	1	1	2
Czech Republic	2006	1	0	1
Czech Republic	2007	1	0	1

Country	Year	Jud Rev	Debate	Total
Czech Republic	2008	1	0	1
Czech Republic	2009	1	0	1
Czech Republic	2010	1	0	1
Poland	1993	1	0	1
Poland	1994	1	0	1
Poland	1995	1	0	1
Poland	1996	1	0	1
Poland	1997	1	0	1
Poland	1998	1	0	1
Poland	1999	1	0	1
Poland	2000	1	0	1
Poland	2001	1	0	1
Poland	2002	1	0	1
Poland	2003	1	0	1
Poland	2004	1	0	1
Poland	2005	1	0	1
Poland	2006	1	0	1
Poland	2007	1	0	1
Poland	2008	1	0	1
Poland	2009	1	0	1
Poland	2010	1	0	1
Romania	1993	0	0	0
Romania	1994	0	0	0
Romania	1995	0	0	0
Romania	1996	0	0	0
Romania	1997	0	0	0
Romania	1998	0	0	0
Romania	1999	0	0	0
Romania	2000	0	0	0
Romania	2001	0	0	0
Romania	2002	0	0	0
Romania	2003	0	0	0
Romania	2004	1	0	1
Romania	2005	1	0	1
Romania	2006	1	0	1
Romania	2007	1	0	1
Romania	2008	1	0	1
Romania	2009	1	0	1

Country	Year	Jud Rev	Debate	Total
Romania	2010	1	0	1
Slovak Republic	1993	1	29	30
Slovak Republic	1994	1	14	15
Slovak Republic	1995	1	10	11
Slovak Republic	1996	1	19	20
Slovak Republic	1997	1	16	17
Slovak Republic	1998	1	34	35
Slovak Republic	1999	1	41	42
Slovak Republic	2000	1	50	51
Slovak Republic	2001	1	33	34
Slovak Republic	2002	1	28	29
Slovak Republic	2003	1	30	31
Slovak Republic	2004	1	21	22
Slovak Republic	2005	1	28	29
Slovak Republic	2006	1	41	42
Slovak Republic	2007	1	13	14
Slovak Republic	2008	1		1
Slovak Republic	2009	1		1
Slovak Republic	2010	1		1

Source: National Constitution and Parliament Websites

JudRev: Whether judicial review of legislative actions is allowed

Debate: References to constitutional court in Parliamentary debates

### **5.1.2 Supranational Constraints**

As explained in Chapter 3 supranational constraints take several forms. Treaties are legally binding constraints on the state's actions. A multitude of treaties exists and a state is party to some or all of them. However, since this dissertation focuses on human rights it considers only human rights treaties. Furthermore, treaties exist at the international and regional levels. Only European regional treaties are included since the case studies are all European. Each level is a separate component of this variable. A value of 0 (not signed or ratified), 1 (signed but not ratified) or 2 (signed and ratified) is assigned for each treaty. Thus, for international treaties this variable will range from 0 (none signed) to

10 (all signed and ratified). The value of this variable for regional treaties ranges from 0 (none signed and ratified) to 6 (all signed and ratified).

An additional component of supranational constraint is European Union accession. The European Union established democracy and human rights standards for the post-communist countries before access (Albi, 2009). Although the European Union closely monitored the post-communist countries for compliance before accession, the scrutiny dropped off after accession (Albi, 2009). Therefore, this component is coded 0 if the country is already a member, 1 if the country is pre-accession, or 2 if the country is within a year of access. The total supranational constraint variable ranges from 0 (no human rights treaties signed and already a member of the European Union) to 18 (all human rights treaties signed and ratified within a year of European Union accession).

Table 5.2 presents the values for each country. All the countries signed all the included international treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms prior to beginning of this study.

**Table 5.2 International Constraints by Country by Year**

Country	Year	IntlTreaty	RegTreaty	EU	Total
Czech Republic	1994	5	11	1	17
Czech Republic	1995	5	11	1	17
Czech Republic	1996	5	11	1	17
Czech Republic	1997	5	11	1	17
Czech Republic	1998	5	12	1	18
Czech Republic	1999	5	13	1	19
Czech Republic	2000	5	13	1	19
Czech Republic	2001	5	13	1	19
Czech Republic	2002	5	13	2	20
Czech Republic	2003	5	13	2	20
Czech Republic	2004	5	13	0	18
Czech Republic	2005	5	13	0	18
Czech Republic	2006	5	13	0	18
Czech Republic	2007	5	13	0	18
Czech Republic	2008	5	13	0	18
Czech Republic	2009	5	13	0	18
Czech Republic	2010	5	13	0	18

Country	Year	IntlTreaty	RegTreaty	EU	Total
Poland	1993	5	11	1	17
Poland	1994	5	11	1	17
Poland	1995	5	11	1	17
Poland	1996	5	11	1	17
Poland	1997	5	12	1	18
Poland	1998	5	12	1	18
Poland	1999	5	12	1	18
Poland	2000	5	12	1	18
Poland	2001	5	13	1	19
Poland	2002	5	13	1	19
Poland	2003	5	13	2	20
Poland	2004	5	13	2	20
Poland	2005	5	13	0	18
Poland	2006	5	13	0	18
Poland	2007	5	13	0	18
Poland	2008	5	13	0	18
Poland	2009	5	13	0	18
Poland	2010	5	13	0	18
Romania	1993	5	11	1	17
Romania	1994	5	11	1	17
Romania	1995	5	11	1	17
Romania	1996	5	12	1	18
Romania	1997	5	12	1	18
Romania	1998	5	12	1	18
Romania	1999	5	13	1	19
Romania	2000	5	13	1	19
Romania	2001	5	13	1	19
Romania	2002	5	13	1	19
Romania	2003	5	13	1	19
Romania	2004	5	13	1	19
Romania	2005	5	13	1	19
Romania	2006	5	13	2	20
Romania	2007	5	13	2	20
Romania	2008	5	13	0	18
Romania	2009	5	13	0	18
Romania	2010	5	13	0	18
Slovak Republic	1993	5	11	1	17

Country	Year	IntlTreaty	RegTreaty	EU	Total
Slovak Republic	1994	5	11	1	17
Slovak Republic	1995	5	12	1	18
Slovak Republic	1996	5	12	1	18
Slovak Republic	1997	5	12	1	18
Slovak Republic	1998	5	12	1	18
Slovak Republic	1999	5	12	1	18
Slovak Republic	2000	5	12	1	18
Slovak Republic	2001	5	12	1	18
Slovak Republic	2002	5	12	1	18
Slovak Republic	2003	5	12	2	19
Slovak Republic	2004	5	12	2	19
Slovak Republic	2005	5	12	0	17
Slovak Republic	2006	5	12	0	17
Slovak Republic	2007	5	12	0	17
Slovak Republic	2008	5	12	0	17
Slovak Republic	2009	5	13	0	18
Slovak Republic	2010	5	13	0	18

IntlTreaty: Number of international human rights treaties signed and ratified

RegTreaty: Number of EU human rights treaties signed and ratified

EU: Membership in EU

This table presents the values for each country. All the countries signed all the included international treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms prior to beginning of this study.

## 5.2 Analysis

As described above the dependent variable is a summation of constitutional court constraints on the legislature during each year. The key independent variable is a count of supranational constraints. In other words, the variables are counts of occurrences. This data is also panel data because the measures of the variables occur yearly. Consequently, the statistical test of this hypothesis uses the Panel Poisson Regression. The results appear in Table 5.3.

**Table 5.3 Poisson Regression of International Influences on Constitutional Court Constraints**

	Coefficient	Error	Significance
Supra	-2.945	0.037266	0.000



EU	0.175	0.048642	0.000
Constant	-13.309	0.686781	0.000

Chi-Square                      382.270                      0.000

Dependent Variable: Constitutional Court constraints on the legislature

Supra: International human rights treaties

EU: Pre-accession status with the European Union

N = 49

Both variables are statistically significant at the  $p < .001$  level. The impact of the European Union pre-accession constraints is positive but small. Changing the pre-accession constraints alters the constitutional court constraints on the legislature by less than one point. International human rights treaties have a greater impact although it is negative. Becoming party to an international human rights treaty decreases constitutional court constraints on the legislature by 2 points. Due to the negative relationship between supranational constraints and constitutional court constraints on the legislature, the hypothesis requires further analysis.

Since the independent variable, supranational constraints, has three components, a more detailed analysis is possible using the three components. However, inspection indicates that the first component, international treaties, has no variance within or across cases. Therefore, the regression does not include this variable. It does include the regional treaty and European Union accession components.

Table 5.4 displays the results of the regression analysis. As can be seen, both variables are statistically significant at the  $p < .001$  level. These variables also have a greater impact than in the last regression. A change in EU accession status increases constitutional court constraints on the legislature by half a point. Conversely, a change in the regional treaty status decreases constitutional court constraints on the legislature by over 4 points. Once again, the negative relationship prevents acceptance of the hypothesis as worded.

**Table 5.4 Poisson Regression of Regional Influences on Constitutional Court Constraints**

	Coefficient	Error	Significance
Regional	-4.015	0.036205	0.000

EU	0.585	.0377.98	0.000
Constant	-1948.150	0.833489	0.000

Chi-Square                      12369.160                      0.000

Dependent Variable: Constitutional Court constraints on the legislature

Regional: European human rights treaties

EU: Pre-accession status with the European Union

N = 49

Two corollaries to this second hypothesis are relevant. The first corollary posits that *as constitutional court constraints on the legislature increase human rights protections increase*. This corollary tests the effectiveness of the constitutional court's judicial review of legislation for the protection of human rights. The dependent variable is the CIRI measure of human rights as defined and operationalized in Chapter 4. The independent variable is constitutional court constraints on legislative autonomy. Legislative influence on human rights does not necessarily present itself immediately. Therefore, the calculation for this variable includes a one-year lag. Since this involves human rights, a control for GDP is necessary. Table 5.5 displays the results of the regression.

There is a positive relationship between the GDP variable and human rights. However, the impact is very small and not statistically significant. Constitutional court constraints on the legislature are negatively correlated with human rights at the statistically significant  $p < .05$  level. Again, the impact is very small. For both variables, each change has less than a one-point impact in human rights protections. Overall, based on the R-square value, the model explains 34% of the variance.

**Table 5.5 Panel Regression of Constitutional Court Constraints and Human Rights**

	Coefficient	Error	Significance
Autonomy	-0.015	0.006669	0.028
GDP	0.000	0.000116	0.721
Constant	19.446	1.525833	0.000
R-square		0.3427	

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Autonomy: Constitutional Court constraints on legislature

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

N = 49

As discussed in the last chapter, a more specific measure of the country's economy is GDP per capita. Table 5.6 presents the regression using GDP per capita in place of overall GDP. As indicated by the R-square value this model accounts for less of the variance, 28%, than the overall GDP model. Furthermore, both variables have less impact on the dependent variable than in the previous model. However, autonomy retains a negative relationship with human rights and remains statistically significant at the  $p < .05$  level. GDP per capita has a positive relationship with human rights but is not statistically significant. Consequently, the first corollary requires rejecting in favor of its reverse that *as constitutional court constraints on the legislature increase human rights protections decrease*.

**Table 5.6 Constitutional Court Constraints and Human Rights with GDP per capita**

	Coefficient	Error	Significance
Autonomy	-0.014	0.006629	0.034
GDP per capita	0.000	0.0000567	0.084
Constant	19.755	1.078443	0.000
R-square		0.2772	

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Autonomy: Constitutional Court constraints on legislature

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

N = 49

The second corollary posits that *as supranational constraints increase human rights protections increase*. This corollary tests the impact of supranational constraints, such as regional treaties and the European Union, on the protection of human rights. The dependent variable is the CIRI measure of human rights as defined and operationalized in Chapter 4. The independent variable is supranational constraints as defined in this chapter. Controls include both GDP and the Polity score. Table 5.7 presents the results of the panel ordered logistic regression.

Again, the relationship between supranational constraints for the protection of human rights and human rights is negative. This is statistically significant at the  $p < .01$  level. An increase in supranational protections decreases human rights by 1 point. GDP is statistically significant at the  $p < .05$  level. However, this is a positive relationship where an increase in GDP increases human rights by one and a half points. The relationship between human rights and polity is neither statistically significant nor notable. A one-point change in polity increases human rights by less than one point.

**Table 5.7 Regression of Supranational Constraints and Human Rights Protections**

	Coefficient	Error	Significance
Supra	-1.029	0.399072	0.010
GDP	1.598	0.72907	0.028
Polity	0.359	0.383265	0.349
Chi-Square	8.130		0.044

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Supra: International human rights constraints

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

N = 49

Table 5.8 presents the results of the regression using per capita GDP. In this model none of the variables are statistically significant at the  $p < .05$  level. Furthermore, they have a smaller impact. All of the variables have less than a one-point impact on the human rights variable. While human rights still have a negative relationship with supranational constraints, they now also have a negative relationship with GDP per capita.

**Table 5.8 Regression of Supranational Constraints and Human Rights with GDP per capita**

	Coefficient	Error	Significance
Supra	-0.272	0.3687319	0.121
GDP per capita	-0.087	0.3416611	0.800
Polity	0.358	0.3962913	0.366
Chi-Square	2.430		0.489

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Supra: International human rights constraints

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

N = 49

As noted above, European constraints displayed a greater impact than the combined supranational constraints. Table 5.9 displays the statistical assessment of European specific constraints. Of the control variables GDP and Polity only GDP is statistically significant at the  $p < .05$  level. Polity also has a minimal impact on human rights as a one level improvement alters the human rights score by less than one point. GDP has the largest impact of all variables since an improvement in GDP increases human rights protections by over one and a half points. EU accession constraints are not statistically significant and have a minimal impact. An increase in European Union accession constraints increases human rights protections by just over half a point. The impact of regional treaties is statistically significant at the  $p < .01$  level but displays a negative relationship. An increase in regional treaties decreases human rights protections by more than one point. Consequently, tests of this corollary indicate the complicated nature of the relationship between supranational constraints and human rights.

**Table 5.9 Regression of Supranational Constraints and Human Rights**

	Coefficient	Error	Significance
Regional	-1.272	0.470312	0.007
EU	0.593	0.568587	0.297
GDP	1.662	0.650026	0.011
Polity	0.311	0.384798	0.419

Chi-Square 11.160 0.025

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Regional: European specific treaties

EU: Pre-accession influence of the European Union

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

N = 49

Finally, Table 5.10 presents the above model using GDP per capita. As in the prior model, changing from GDP to GDP per capita causes the relationship with human rights to become negative. In addition, no variable is statistically significant and the impact of a one-point change in any of the variables changes the human rights variable less than one point.

**Table 5.10 Regression of Supranational Constraints and Human Rights using GDP per capita**

	Coefficient	Error	Significance
Regional	-0.653	0.4501608	0.147
EU	0.366	0.5779876	0.527
GDP per capita	-0.088	0.3467115	0.799
Polity	0.319	0.4048133	0.431
Chi-Square	2.410		0.661
Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <a href="http://ciri.binghamton.edu/">http://ciri.binghamton.edu/</a> accessed December 30, 2012			
Regional: European specific treaties			
EU: Pre-accession influence of the European Union			
GDP source: Penn World Table available at <a href="http://www.rug.nl/research/ggdc/data/penn-world-table">http://www.rug.nl/research/ggdc/data/penn-world-table</a> accessed January 14, 2014			
Polity: Polity scores available at <a href="http://www.systemicpeace.org/polity/polity4.htm">http://www.systemicpeace.org/polity/polity4.htm</a> accessed January 14, 2014			
N = 49			

### 5.3 Discussion

Testing of the second hypothesis and corollaries illustrates several important features in the relationship between constitutional court, legislatures, and human rights. First, partial acceptance of the second hypothesis, that *as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures*, demonstrates that supranational constraints affect the dynamics between national institutions. The test of this hypothesis demonstrates a relationship between supranational constraints and increased limits on the legislature's freedom to act by the constitutional court. Although relationship does not mean causation, it does indicate that supranational influences result in a change of behavior by the legislature.

However, the impact is mixed. International and regional treaties indicated a negative relationship with human rights while EU accession indicated a positive relationship. One possible explanation for this mixed effect is the different direct impact of these two constraints. Existing research posits that countries join international and regional human rights treaties for reasons other than the protection of human rights, such as international legitimacy (Hirschl, 2004). Although many of these treaties have monitoring provisions there is little incentive for adherence to, or punishment for violation of, the treaty (Hirschl, 2004). Conversely, pre-accession monitoring by the EU attaches significant costs and benefits.

Second, the first corollary indicates that constitutional court constraints on the legislature have a negative relationship with human rights protections. An effect of constitutional court constraints on the legislature is that it creates a self-censoring legislature. While the intent is to increase human rights protections, there is the possibility of unintended consequences such as delayed legislation or lacking legislation. Consequently, there is a delay in correcting human rights issues. Another possibility is that increased constitutional court actions increase the perceptions, and reports, of human rights violations. This is particularly possible in post-communist countries where there is a lack of familiarity with individual rights (Sajo, 1995).

Third, taken together these results urge caution in actions to protect human rights. Although human rights protections frequently involve constraining majority interests (Hirschl, 2004), it is not a direct relationship. Based on the findings presented here, monitoring with valued carrots and sticks more effectively protect human rights than treaties or constitutional court actions.

Yet the major finding in this chapter is the simple evidence of constitutional court constraints on the legislatures. Legislative debates from the cases demonstrate several different constraints. Legislators clearly stated concern regarding the constitutional court's potential rejection of the wording of legislation. They also chose to defer some concerns allowing the constitutional court to handle them.

Minorities also threatened constitutional court action when they objected to prospective legislation. This evidence supports existing research positing the political relationship between constitutional courts and legislatures (Hirschl, 2004).

#### **5.4 Conclusion**

The results presented in this chapter provide additional insight into the research question. The research question asks if the constitutional court limits the autonomy of the legislature to protect human rights. By looking at the supranational influence of both international and regional human rights treaties, as well as the related relationship between supranational constraints and human rights, this chapter explored the ability of international legal requirements to empower national constitutional courts. Two significant insights into the research question emerged.

The statistically significant results of the hypothesis test indicate that supranational constraints alter the influence of the constitutional court on the legislature. In other words, supranational constraints correlate with changes in legislative autonomy vis-à-vis the constitutional court. This does not mean that supranational constraints cause legislatures to lose autonomy to the constitutional courts. However, even a relationship indicates that supranational constraints make a difference. Since there is an increased focus on regional and international human rights treaties this is an encouraging finding.

Second, the negative relationship between constitutional court constraints on the legislature and the increased protection of human rights begins to answer the research question. Once again, the results indicate relationship, which is different from causation. The results of the tests in this chapter do not indicate that constitutional court constraints on the legislature cause decreased human rights protections. They do indicate, however, a relationship. In that sense, they indicate that both constitutional court and legislative autonomy are important to the protection of human rights.



However, one overreaching explanation deserves consideration. The national legal and political system may see international and regional constraints as political rather than legal impacts (Van Galhn and Taulbee, 2013). Courts focus on law and, as far as possible, distance themselves from the political. Responsibility for international relations falls to the executive and legislative branches (Van Galhn and Taulbee, 2013). Consequently, constitutional courts may not perceive any need to ensure compliance with international constraints. As a result, any impact of supranational constraints on the relationship between constitutional courts and the legislature may be serendipitous.

Similarly, national legislatures may cede autonomy to constitutional courts for purely political reasons. Comments made during the legislative debates support this interpretation. For example, the Romanian Chamber of Deputies referred to the constitutional court as a political court.<sup>40</sup> Similarly, the Polish Sejm indicated that a decision of the constitutional court was politically motivated.<sup>41</sup> There were also comments where the opposition party threatened to challenge the law at the constitutional court.<sup>42</sup> Such comments indicate that a political relationship between institutions exists and political actors recognize its use. Consequently, constitutional court decisions, and choices by the legislature to follow them, may result from political motivations unrelated to human rights protections. Although this relegates increased human rights protections to an unintended consequence of political actions, it does not minimize the benefit to citizens.

The next chapter further explores the relationship of the political climate to constitutional court constraints resulting in increased human rights protections. Chapter 6 explores the relationship between the political climates at the transition to democracy.

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<sup>40</sup> Debate in the Chamber of Deputies on June 4, 2004 available at <http://www.cdep.ro/pls/steno/steno.stenograma?ids=5687&idm=3&idl=1> accessed March 27, 2013

<sup>41</sup> Debate in the Sejm on April 24, 1997 available at <http://orka2.sejm.gov.pl/Debata3.nsf> accessed March 27, 2013

<sup>42</sup> See Romanian Chamber of Deputies comments by Predescu on Sept 4, 1996, Polish Sejm comments by Grabicka on June 12, 2003, Czech Joint Session of January 20, 1998, Slovak National Council comments by Mikloško on March 16, 1993 as examples.

## 6 THIRD HYPOTHESIS

This chapter tests the third and final hypothesis, that *constitutional courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral.*

This chapter builds on the earlier findings by investigating the relationship between constitutional courts and the transition to democracy. Central Eastern European countries had unique experiences during their transitions to democracy. Some were smooth and negotiated while others were bumpy and divisive (Fitzmaurice, 1998). The constructing of new constitutions reflected these varying experiences (Fitzmaurice, 1998). Since constitutions contain the rules governing the political and legal systems, including the structure and functioning of the constitutional court (Zeisberg, 2004), it is possible that the transition experiences influence the constitutional court's ability to protect human rights.

### 6.1 Variables

The dependent variable is the use of international law in constitutional court decisions. The key independent variable is the transition to democracy.

#### 6.1.1 *Use of International Law in Constitutional Court Decisions*

The operationalization of this variable is whether the constitutional court references international law in their written decisions. Constitutional courts may directly reference international law in their decisions. Schimmelfennig (2006) argues that courts reference international law in their written decisions, particularly international human rights law, to increase their legitimacy. However, it is possible that constitutional court judges consider international law while arriving at the decision but do not reference it in their written decisions. Such use of international law is not included in this dissertation for two reasons. First, the deliberations of the constitutional court are not available.

Therefore, there is no documented method to confirm the consideration of international law. Second, considering only the specific references to international law in the written decisions prevents overestimating the results and accepting the hypothesis in error. While this may result in rejecting the hypothesis in error, it will ensure that testing the hypothesis occurs under stringent conditions.

Since the focus of this dissertation is human rights protections, the definition of international law is international human rights treaties. This includes both international and supranational human rights treaties. A second source of international law is rulings by international courts or regional courts. Decisions by international courts, for example the International Court of Justice and the International Criminal Court, are binding only on the countries involved in the case (Shaw, 2008). However, they are a recognized source of international law according to Article 38 of the Statute of the International Court of Justice (Shaw, 2008). Regional courts, for the countries of post-communist Europe these are the European Court of Justice and the European Court of Human Rights, are both binding on the members of the European Union and a source of law (Shaw, 2008; Buergenthal and Murphy, 2007). Therefore, the constitutional court also references international law when it references the decisions of international court.

Another possible source of international law is customary international law (Shaw, 2008). Customary international law develops when countries act as if they are legally bound but there is no written law (Shaw, 2008). In other words, customary international law results from state action and state belief (Shaw, 2008). This dissertation uses two sources to identify customary international law. First, constitutional courts might identify customary international law through the decisions of other national courts. Second, a constitutional court might view a binding norm as customary international law. Customary international law is much debated, however, this dissertation includes this source of international law to ensure inclusion of all possible sources.

A value of 0 is assigned to the constitutional court decision if there is no reference to any of the above international treaties, international courts, or regional courts. If the decision contains a reference to any of the above treaties, international courts, or regional courts, it is assigned a value of 1.

Therefore, the minimum value for this variable is 0 while the maximum value depends on the number of constitutional court decisions.

Table 6.1 shows the decisions and use of international law. This table illustrates the variance in usage of international law across countries.

**Table 6.1 Use of International Law in Constitutional Court Decisions by Country**

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Romania	4/1992	Yes	Yes	No	No	No	1
Romania	1/1993	No	No	No	No	No	0
Romania	22/1993	No	No	No	No	No	0
Romania	35/1993	No	No	No	No	No	0
Romania	47/1994	Yes	Yes	No	No	No	1
Romania	49/1994	No	No	No	No	No	0
Romania	139/1994	Yes	Yes	No	No	No	1
Romania	45/1994	No	No	No	No	No	0
Romania	46/1994	No	No	No	No	No	0
Romania	87/1994	No	No	No	No	No	0
Romania	32/1994	Yes	Yes	No	No	No	1
Romania	59/1994	No	No	No	No	No	0
Romania	1/1994	No	No	No	No	No	0
Romania	19/1995	No	No	No	Yes	No	1
Romania	62/1995	No	No	No	No	No	0
Romania	72/1995	Yes	Yes	No	Yes	No	1
Romania	1/1995	No	No	No	No	No	0
Romania	66/1995	No	No	No	No	No	0
Romania	91/1995	No	Yes	No	No	No	1
Romania	3/1995	No	No	No	No	No	0
Romania	35/1996	Yes	Yes	No	No	No	1
Romania	71/1996	Yes	Yes	No	No	No	1
Romania	96/1996	Yes	Yes	No	Yes	No	1
Romania	392/1997	No	No	No	No	No	0
Romania	97/1997	No	No	No	No	No	0
Romania	279/1997	No	No	No	No	No	0
Romania	95/1998	No	Yes	No	No	No	1
Romania	22/1998	No	Yes	No	No	No	1
Romania	25/1998	Yes	Yes	No	No	No	1
Romania	45/1998	Yes	Yes	No	No	No	1
Romania	81/1998	Yes	Yes	No	Yes	No	1

<b>Country</b>	<b>CaseID</b>	<b>Intl Juris</b>	<b>Intl Norm</b>	<b>ECJ</b>	<b>ECHR</b>	<b>Intl Court</b>	<b>Intl</b>
Romania	83/1998	No	No	No	No	No	0
Romania	177/1998	No	Yes	No	No	No	1
Romania	70/1999	No	No	No	No	No	0
Romania	24/1999	No	No	No	No	No	0
Romania	28/1999	No	Yes	No	No	No	1
Romania	47/1999	No	Yes	No	No	No	1
Romania	143/1999	No	No	No	No	No	0
Romania	234/1999	Yes	Yes	No	No	No	1
Romania	192/2002	No	No	No	No	No	0
Romania	7/2002	No	No	No	No	No	0
Romania	98/2002	No	No	No	No	No	0
Romania	223/2002	No	Yes	No	No	No	1
Romania	259/2002	Yes	Yes	No	No	No	1
Romania	294/2002	No	No	No	No	No	0
Romania	308/2002	Yes	Yes	No	No	No	1
Romania	312/2002	No	No	No	No	No	0
Romania	333/2002	No	No	No	No	No	0
Romania	148/2003	Yes	Yes	No	No	No	1
Romania	300/2003	No	No	No	No	No	0
Romania	67/2003	No	No	No	No	No	0
Romania	86/2003	Yes	Yes	No	No	No	1
Romania	89/2003	No	No	No	Yes	No	1
Romania	127/2003	No	No	No	No	No	0
Romania	176/2003	No	No	No	No	No	0
Romania	187/2003	No	No	No	No	No	0
Romania	193/2003	No	No	No	No	No	0
Romania	217/2003	Yes	No	No	Yes	No	1
Romania	233/2003	No	No	No	No	No	0
Romania	259/2003	No	No	No	Yes	No	1
Romania	388/2003	Yes	Yes	No	No	No	1
Romania	463/2003	Yes	Yes	No	No	No	1
Romania	196/2004	No	No	No	No	No	0
Romania	39/2004	No	No	No	No	No	0
Romania	40/2004	No	No	No	Yes	No	1
Romania	100/2004	Yes	Yes	No	Yes	No	1
Romania	194/2004	Yes	No	No	Yes	No	1
Romania	293/2004	Yes	Yes	No	No	No	1
Romania	408/2004	No	No	No	No	No	0
Romania	433/2004	Yes	Yes	No	No	No	1
Romania	482/2004	No	No	No	No	No	0
Romania	217/2005	Yes	Yes	No	No	No	1
Romania	235/2005	No	Yes	No	No	No	1
Romania	255/2005	No	No	No	No	No	0
Romania	375/2005	No	Yes	No	Yes	No	1
Romania	418/2005	No	No	No	No	No	0
Romania	16	No	No	No	No	No	0
Romania	147	No	No	No	No	No	0

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Romania	230	No	No	No	No	No	0
Romania	355	No	No	No	No	No	0
Romania	421	No	No	No	No	No	0
Romania	666	No	No	No	No	No	0
Romania	970	No	No	No	No	No	0
Romania	971	No	No	No	No	No	0
Romania	972	No	No	No	No	No	0
Romania	1177	No	Yes	No	No	No	1
Romania	148	No	No	No	No	No	0
Romania	266	No	No	No	No	No	0
Romania	61	No	No	No	Yes	No	1
Romania	62	No	Yes	No	Yes	No	1
Romania	65	No	No	No	No	No	0
Romania	227	No	No	No	No	No	0
Romania	228	No	No	No	No	No	0
Romania	264	No	Yes	No	No	No	1
Romania	347	No	No	No	No	No	0
Romania	392	No	No	No	No	No	0
Romania	610	No	Yes	No	Yes	No	1
Romania	660	No	No	No	No	No	0
Romania	661	No	No	No	No	No	0
Romania	665	No	Yes	No	No	No	1
Romania	691	No	Yes	No	Yes	No	1
Romania	797	No	No	No	Yes	No	1
Romania	870	No	Yes	No	Yes	No	1
Romania	871	No	Yes	No	Yes	No	1
Romania	969	No	Yes	No	Yes	No	1
Romania	1058	No	No	No	No	No	0
Romania	1059	No	No	No	No	No	0
Romania	1086	No	No	No	No	No	0
Romania	1133	No	No	No	No	No	0
Romania	1137	No	Yes	No	Yes	No	1
Romania	1219	No	No	No	No	No	0
Romania	356	No	No	No	No	No	0
Romania	20/2000	No	No	No	No	No	0
Romania	199/1999	No	No	No	No	No	0
Romania	282/2002	No	No	No	No	No	0
Romania	38/2003	No	No	No	No	No	0
Romania	307/2003	No	No	No	No	No	0
Romania	123/1996	Yes	No	No	Yes	No	1
Romania	211/2000	No	Yes	No	Yes	No	1
Romania	23/1996	Yes	No	No	Yes	No	1
Romania	73/1996	No	Yes	No	No	No	1
Romania	91/1996	No	Yes	No	No	No	1
	<b>Intl Law</b>						54
	<b>Cases</b>						122
Poland	K39/07	No	No	No	Yes	No	1

<b>Country</b>	<b>CaseID</b>	<b>Intl Juris</b>	<b>Intl Norm</b>	<b>ECJ</b>	<b>ECHR</b>	<b>Intl Court</b>	<b>Intl</b>
Poland	SK7/06	No	Yes	No	Yes	No	1
Poland	P10/07	No	No	No	No	No	0
Poland	K2/07	No	Yes	No	Yes	No	1
Poland	SK20/05	No	Yes	No	Yes	Yes	1
Poland	K8/07	No	No	No	No	No	0
Poland	K28/05	No	Yes	No	No	No	1
Poland	KP 3/08	No	Yes	Yes	Yes	No	1
Poland	K 44/07	No	Yes	No	Yes	No	1
Poland	K 51/07	No	No	No	No	No	0
Poland	K 8/04	No	No	No	No	No	0
Poland	K 42/07	No	No	No	Yes	No	1
Poland	SK 16/07	No	No	No	Yes	No	1
Poland	P 37/05	No	Yes	Yes	No	No	1
Poland	U 4/06	No	Yes	No	No	No	1
Poland	P 24/05	No	No	No	No	No	0
Poland	Ts 143/06	No	No	No	No	No	0
Poland	P 33/05	No	No	No	No	No	0
Poland	Ts 98/05	No	No	No	No	No	0
Poland	K 40/05	No	No	No	No	No	0
Poland	SK 25/06	No	No	No	No	No	0
Poland	SK 55/05	No	No	No	No	No	0
Poland	P 32/05	No	No	No	No	No	0
Poland	K 53/05	No	No	No	No	No	0
Poland	K 6/06	No	No	No	No	No	0
Poland	SK 57/04	No	No	No	No	No	0
Poland	K 11/04	No	No	No	No	No	0
Poland	K 4/06	No	No	No	No	No	0
Poland	K 17/05	Yes	Yes	No	Yes	No	1
Poland	P 8/05	No	No	No	No	No	0
Poland	Ts 198/05	No	No	No	No	No	0
Poland	K 48/04	No	No	No	No	No	0
Poland	K 9/05	No	Yes	No	No	No	1
Poland	SK 58/05	No	No	No	No	No	0
Poland	K 21/05	No	No	No	No	No	0
Poland	Ts 196/04	No	Yes	No	No	No	1
Poland	SK 30/05	No	Yes	No	No	No	1
Poland	K 32/04	No	No	No	No	No	0
Poland	K 22/05	No	No	No	No	No	0
Poland	P 3/05	No	No	No	No	No	0
Poland	Kp 2/05	No	No	No	No	No	0
Poland	K 31/04	No	No	No	No	No	0
Poland	K 31/05	No	No	No	No	No	0
Poland	K 37/05	No	No	No	No	No	0
Poland	K 38/04	Yes	Yes	No	No	No	1
Poland	Tw 23/05	No	No	No	No	No	0
Poland	K 42/04	No	No	No	No	No	0
	<b>Intl Law</b>						16

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
	Cases						47
Czech	25/07	Yes	Yes	No	Yes	No	1
Czech	77/06	No	Yes	No	Yes	No	1
Czech	51/06	No	Yes	No	Yes	No	1
Czech	18/06	No	Yes	No	No	No	1
Czech	8/06	No	No	No	No	No	0
Czech	4/06	No	Yes	No	No	No	1
Czech	693/06	No	Yes	No	No	No	1
Czech	516/06	No	Yes	No	No	No	1
Czech	568/06	No	Yes	No	Yes	No	1
Czech	768/06	No	No	No	No	No	0
Czech	36/05	No	Yes	Yes	No	No	1
Czech	20/05	No	Yes	No	Yes	No	1
Czech	13/05	No	Yes	No	Yes	No	1
Czech	6/05	No	Yes	No	Yes	No	1
Czech	1/05	No	No	No	No	No	0
Czech	31/05	No	No	No	Yes	No	1
Czech	37/04	No	Yes	Yes	Yes	No	1
Czech	34/04	No	Yes	No	No	No	1
Czech	30/04	No	No	No	No	No	0
Czech	28/04	No	Yes	No	Yes	No	1
Czech	15/04	No	Yes	No	Yes	No	1
Czech	73/04	No	Yes	No	No	No	1
Czech	69/04	No	Yes	No	No	No	1
Czech	66/04	Yes	Yes	Yes	No	Yes	1
Czech	50/04	No	Yes	Yes	Yes	No	1
Czech	45/04	No	Yes	No	Yes	No	1
Czech	42/04	Yes	Yes	No	Yes	No	1
Czech	21/04	No	Yes	No	No	No	1
Czech	20/04	No	Yes	No	Yes	No	1
Czech	11/04	Yes	Yes	No	Yes	No	1
Czech	606/04	No	Yes	No	No	No	1
Czech	252/04	No	Yes	Yes	No	No	1
Czech	209/04	No	Yes	No	No	No	1
Czech	668/04	No	No	No	No	No	0
Czech	601/04	No	Yes	No	Yes	No	1
Czech	554/04	No	Yes	No	Yes	No	1
Czech	167/04	No	Yes	No	No	No	1
Czech	85/04	Yes	Yes	No	Yes	No	1
Czech	23/04	No	No	No	No	No	0
Czech	38/04	No	No	Yes	Yes	No	1
Czech	52/03	No	Yes	No	No	No	1
Czech	42/03	No	Yes	No	Yes	No	1
Czech	38/03	No	Yes	No	No	No	1
Czech	31/03	No	Yes	No	Yes	No	1
Czech	12/03	No	Yes	No	No	No	1
Czech	10/03	No	Yes	No	No	No	1



Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Czech	5/03	No	Yes	No	No	No	1
Czech	1/03	No	Yes	No	Yes	No	1
Czech	396/03	No	Yes	No	No	No	1
Czech	459/03	No	Yes	No	Yes	No	1
Czech	258/03	No	No	No	No	No	0
Czech	150/03	No	Yes	No	No	No	1
Czech	453/03	No	Yes	No	Yes	No	1
Czech	367/03	No	Yes	No	Yes	No	1
Czech	44/02	No	Yes	No	Yes	No	1
Czech	42/02	No	Yes	No	Yes	No	1
Czech	41/02	No	Yes	No	Yes	No	1
Czech	40/02	No	Yes	No	Yes	No	1
Czech	39/02	No	No	No	No	No	0
Czech	38/02	No	Yes	No	No	No	1
Czech	34/02	No	Yes	No	Yes	No	1
Czech	19/02	No	No	No	No	No	0
Czech	17/02	No	Yes	No	No	No	1
Czech	16/02	No	No	No	No	No	0
Czech	14/02	No	Yes	No	No	No	1
Czech	11/02	No	Yes	No	Yes	No	1
Czech	7/02	No	Yes	No	Yes	No	1
Czech	6/02	No	Yes	No	Yes	No	1
Czech	5/02	No	Yes	No	No	No	1
Czech	3/02	No	Yes	No	No	No	1
Czech	2/02	No	Yes	No	Yes	No	1
Czech	1/02	No	Yes	No	No	No	1
Czech	656/02	No	Yes	No	Yes	No	1
Czech	482/02	No	Yes	No	Yes	No	1
Czech	405/02	Yes	Yes	No	No	No	1
Czech	752/02	No	Yes	No	Yes	No	1
Czech	153/02	No	No	No	No	No	0
Czech	38/02	No	Yes	No	No	No	1
Czech	39/01	No	Yes	Yes	Yes	No	1
Czech	36/01	No	Yes	No	Yes	No	1
Czech	33/01	No	Yes	No	No	No	1
Czech	24/01	No	Yes	No	No	No	1
Czech	21/01	No	Yes	No	No	No	1
Czech	18/01	No	No	No	No	No	0
Czech	15/01	No	Yes	No	Yes	No	1
Czech	14/01	No	Yes	No	No	No	1
Czech	11/01	No	Yes	No	No	No	1
Czech	9/01	Yes	Yes	No	Yes	Yes	1
Czech	5/01	No	Yes	Yes	Yes	No	1
Czech	1/01	No	Yes	No	No	No	1
Czech	512/01	No	Yes	No	No	No	1
Czech	256/01	No	Yes	No	No	No	1
Czech	754/01	Yes	Yes	No	No	No	1

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Czech	663/01	No	Yes	No	Yes	No	1
Czech	213/2000	No	Yes	No	Yes	No	1
Czech	17/98	No	Yes	No	No	No	1
Czech	526/98	Yes	Yes	No	Yes	No	1
Czech	98/97	Yes	Yes	No	No	No	1
Czech	34/97	Yes	Yes	No	No	Yes	1
Czech	425/97	No	Yes	No	No	No	1
Czech	25/96	No	Yes	No	No	No	1
Czech	276/96	No	No	No	No	No	0
Czech	275/96	No	No	No	No	No	0
Czech	291/96	No	Yes	No	No	No	1
Czech	127/96	No	No	No	No	No	0
Czech	5/96	No	No	No	No	No	0
Czech	5/95	Yes	Yes	No	No	No	1
Czech	81/95	No	Yes	No	No	No	1
Czech	98/95	No	No	No	No	No	0
Czech	43/93	Yes	Yes	No	Yes	No	1
Czech	26/94	No	Yes	No	No	No	1
Czech	25/94	Yes	Yes	No	No	No	1
Czech	20/94	No	Yes	No	No	No	1
Czech	14/94	No	Yes	No	No	No	1
Czech	9/94	Yes	Yes	No	No	Yes	1
Czech	5/94	No	Yes	No	No	No	1
Czech	4/94	No	Yes	No	Yes	No	1
Czech	3/94	Yes	Yes	No	No	No	1
Czech	215/94	No	Yes	No	No	No	1
Czech	56/94	No	No	No	No	No	0
Czech	19/93	Yes	Yes	No	No	No	1
Czech	5/92	Yes	Yes	No	No	No	1
Czech	1/92	No	Yes	No	No	No	1
Czech	53/04	No	Yes	No	No	No	1
Czech	23/05	No	Yes	No	No	No	1
Czech	56/05	No	Yes	No	No	No	1
Czech	69/06	No	Yes	No	No	No	1
Czech	72/06	No	Yes	No	No	No	1
Czech	2268/07	No	No	No	No	No	0
Czech	12/07	No	Yes	No	No	No	1
Czech	24/07	No	Yes	No	No	No	1
Czech	26/07	No	Yes	No	No	No	1
Czech	1009/08	No	Yes	No	No	No	1
Czech	1/08	No	Yes	No	No	No	1
Czech	2/08	No	Yes	No	No	No	1
Czech	12/08	No	Yes	No	No	No	1
Czech	19/08	No	Yes	No	No	No	1
Czech	35/08	No	No	No	No	No	0
	<b>Intl Law</b>						118
	<b>Cases</b>						138

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Slovak	1/93 (96/93)	No	No	No	No	No	0
Slovak	2/93 (83/93)	No	No	No	No	No	0
Slovak	3/93 (10/93)	No	No	No	No	No	0
Slovak	4/93 (9/93)	No	No	No	No	No	0
Slovak	5/93 (39/93)	No	No	No	No	No	0
Slovak	6/93 (1/93)	No	No	No	No	No	0
Slovak	7/93 (4/93)	No	No	No	No	No	0
Slovak	8/93 (12/93)	No	No	No	No	No	0
Slovak	9/93 (81/93)	No	No	No	No	No	0
Slovak	10/93 (26/93)	No	No	No	No	No	0
Slovak	11/93 (81/93)	No	No	No	No	No	0
Slovak	12/93 (87/93)	No	No	No	No	No	0
Slovak	13/93 (92/93)	No	No	No	No	No	0
Slovak	14/93 (6/93)	No	No	No	No	No	0
Slovak	15/93 (106/93)	No	No	No	No	No	0
Slovak	16/93 (109/93)	No	No	No	No	No	0
Slovak	17/93 (119/93)	No	No	No	No	No	0
Slovak	18/93 (74/93)	No	No	No	No	No	0
Slovak	19/93 (162/93)	No	No	No	No	No	0
Slovak	20/93 (168/93)	No	No	No	No	No	0
Slovak	21/93 (132/93)	No	No	No	No	No	0
Slovak	1/94 (8/94)	No	No	No	No	No	0
Slovak	2/94 (26/94)	No	No	No	No	Yes	1
Slovak	3/94 (76/93)	No	No	No	No	No	0
Slovak	4/94 (9/93)	Yes	No	No	No	No	1
Slovak	5/94 (6/94)	Yes	Yes	No	No	No	1
Slovak	6/94 (29/94)	No	No	No	No	No	0
Slovak	13/94 (7/94)	Yes	No	No	No	No	1
Slovak	14/94 (8/94)	No	No	No	No	No	0
Slovak	23/94 (5/94)	No	No	No	No	No	0
Slovak	24/94 (20/94)	No	No	No	No	No	0
Slovak	25/94 (98/93)	No	No	No	No	No	0
Slovak	26/94 (138/93)	No	No	No	No	No	0
Slovak	27/94 (16/93)	No	No	No	No	No	0
Slovak	28/94 (130/93)	No	No	No	No	No	0
Slovak	29/94 (1/940)	No	No	No	No	No	0
Slovak	30/94 (4/94)	No	No	No	No	No	0
Slovak	31/94 (6/94)	No	No	No	No	No	0
Slovak	32/94 (1/94)	No	No	No	No	No	0
Slovak	33/94 (103/93)	No	No	No	No	No	0
Slovak	34/94 (15/94)	No	No	No	No	No	0
Slovak	35/94 (23/94)	No	No	No	No	No	0
Slovak	36/94 (25/94)	No	No	No	No	No	0
Slovak	37/94 (49/93)	No	No	No	No	No	0
Slovak	38/94 (23/94)	No	No	No	No	No	0
Slovak	39/94 (5/93)	Yes	Yes	No	No	No	1
Slovak	40/94 (22/94)	No	No	No	No	No	0

<b>Country</b>	<b>CaseID</b>	<b>Intl Juris</b>	<b>Intl Norm</b>	<b>ECJ</b>	<b>ECHR</b>	<b>Intl Court</b>	<b>Intl</b>
Slovak	41/94 (27/94)	No	No	No	No	No	0
Slovak	42/94 (31/94)	No	No	No	No	No	0
Slovak	43/94 (37/94)	No	No	No	No	No	0
Slovak	44/94 (50/93)	No	No	No	No	No	0
Slovak	45/94 (37/94)	No	No	No	No	No	0
Slovak	46/94 (47/94)	No	No	No	No	No	0
Slovak	47/94 (36/94)	No	No	No	No	No	0
Slovak	48/94 (48/94)	No	No	No	No	No	0
Slovak	49/94 (4/94)	No	No	No	No	No	0
Slovak	50/94 (11/94)	No	No	No	No	No	0
Slovak	51/94 (16/94)	No	No	No	No	No	0
Slovak	52/94 (17/94)	No	No	No	No	No	0
Slovak	53/94 (52/94)	No	No	No	No	No	0
Slovak	54/94 (15/94)	No	No	No	No	No	0
Slovak	55/94 (19/94)	No	No	No	No	No	0
Slovak	56/94 (54/94)	No	No	No	No	No	0
Slovak	57/94 (42/94)	No	No	No	No	No	0
Slovak	58/94 (126/93)	No	No	No	No	No	0
Slovak	59/94 (59/94)	No	No	No	No	No	0
Slovak	60/94 (46/94)	No	No	No	No	No	0
Slovak	61/94 (25/94)	No	No	No	No	No	0
Slovak	62/94 (31/94)	No	No	No	No	No	0
Slovak	63/94 (34/94)	No	No	No	No	No	0
Slovak	64/94 (62/94)	No	No	No	No	No	0
Slovak	1/95 (29/94)	No	No	No	No	No	0
Slovak	2/95 (7/95)	No	No	No	No	No	0
Slovak	3/95 (17/95)	No	No	No	No	No	0
Slovak	4/95 (8/94)	No	No	No	No	No	0
Slovak	5/95 (10/95)	No	No	No	No	No	0
Slovak	6/95 (16/95)	No	No	No	No	No	0
Slovak	7/95 (26/95)	Yes	No	No	No	No	1
Slovak	8/95 (29/95)	No	No	No	No	No	0
Slovak	9/95 (33/95)	Yes	No	No	Yes	No	1
Slovak	10/95 (94/95)	Yes	No	No	No	No	1
Slovak	11/95 (33/95)	No	No	No	No	No	0
Slovak	12/95 (37/95)	No	No	No	No	No	0
Slovak	13/95 (58/94)	No	No	No	No	No	0
Slovak	14/95 (14/94)	No	No	No	No	No	0
Slovak	15/95 (18/95)	Yes	No	No	No	Yes	1
Slovak	16/95 (23/95)	No	No	No	No	No	0
Slovak	17/95 (22/95)	No	No	No	No	No	0
Slovak	34/95 (1/95)	No	No	No	No	No	0
Slovak	35/95 (2/95)	No	No	No	No	No	0
Slovak	36/95 (38/94)	No	No	No	No	No	0
Slovak	37/95 (3/95)	No	No	No	No	No	0
Slovak	38/95 (10/95)	No	No	No	No	No	0
Slovak	39/95 (11/95)	No	No	No	No	No	0

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Slovak	40/95 (18/95)	Yes	No	No	No	No	1
Slovak	41/95 (18/95)	Yes	No	No	No	No	1
Slovak	42/95 (19/95)	No	No	No	No	No	0
Slovak	43/95 (36/95)	No	No	No	No	No	0
Slovak	44/95 (40/95)	No	No	No	No	No	0
Slovak	45/95 (110/95)	No	No	No	No	No	0
Slovak	46/95 (120/95)	No	No	No	No	No	0
Slovak	47/95 (121,122,123/95)	No	No	No	No	No	0
Slovak	48/95 (128/95)	No	No	No	No	No	0
Slovak	49/95 (71/95)	No	No	No	No	No	0
Slovak	50/95 (133/95)	Yes	No	No	No	No	1
Slovak	51/95 (130/95)	No	No	No	No	No	0
Slovak	52/95 (131/95)	No	No	No	No	No	0
Slovak	1/96 (128/95)	No	No	No	No	No	0
Slovak	2/96 (30/95)	No	No	No	No	No	0
Slovak	3/96 (36/95)	Yes	Yes	No	No	No	1
Slovak	4/96 (38/95)	Yes	No	No	Yes	No	1
Slovak	5/96 (42/95)	No	No	No	No	No	0
Slovak	6/96 (8/96)	No	Yes	No	Yes	No	1
Slovak	7/96 (43/95)	Yes	No	No	Yes	Yes	1
Slovak	8/96 (37/95)	No	No	No	No	No	0
Slovak	9/96 (22/96)	Yes	No	No	Yes	No	1
Slovak	10/96 (32/95)	No	No	No	No	No	0
Slovak	11/96 (1/96)	No	No	No	No	No	0
Slovak	12/96 (7/96)	No	No	No	No	No	0
Slovak	13/96 (51/96)	No	No	No	No	No	0
Slovak	14/96 (61/96)	No	No	No	No	No	0
Slovak	15/96 (2/96)	Yes	No	No	No	No	1
Slovak	16/96 (31/95)	Yes	No	No	No	No	1
Slovak	17/96 (40/95)	Yes	No	No	No	No	1
Slovak	18/96 (39/96)	Yes	No	No	No	No	1
Slovak	19/96 (41/95)	No	No	No	No	No	0
Slovak	20/96 (14/95)	No	No	No	No	No	0
Slovak	22/96 (9/96)	No	No	No	No	No	0
Slovak	23/96 (10/96)	No	No	No	No	No	0
Slovak	24/96 (11/96)	No	No	No	No	No	0
Slovak	25/96 (16/96)	No	No	No	No	No	0
Slovak	26/96 (50/96)	No	No	No	No	No	0
Slovak	27/96 (56/96)	No	No	No	No	No	0
Slovak	28/96 (55/96)	No	No	No	No	No	0
Slovak	29/96 (69/96)	No	No	No	No	No	0
Slovak	30/96 (1.96)	No	No	No	No	No	0
Slovak	31/96 (3/96)	No	No	No	No	No	0
Slovak	32/96 (8/96)	Yes	No	No	No	No	1
Slovak	33/96 (19/96)	No	No	No	No	No	0
Slovak	34/96 (14/96)	No	No	No	No	No	0

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Slovak	35/96 (15/96)	No	No	No	No	No	0
Slovak	36/96 (20/96)	No	No	No	No	No	0
Slovak	37/96 (21/96)	No	No	No	No	No	0
Slovak	38/96 (25/96)	No	No	No	No	No	0
Slovak	39/96 (32/96)	No	No	No	No	No	0
Slovak	40/96 (36/96)	No	No	No	No	No	0
Slovak	41/96 (37/96)	Yes	No	No	No	No	1
Slovak	42/96 (38/96)	No	No	No	No	No	0
Slovak	43/96 (52/96)	No	No	No	No	No	0
Slovak	44/96 (34/96)	No	No	No	No	No	0
Slovak	1/97 (45/96)	No	Yes	No	No	No	1
Slovak	2/97 (7/96)	No	No	No	No	No	0
Slovak	3/97 (47/96)	No	No	No	Yes	No	1
Slovak	4/97 ( 8/97)	No	Yes	No	Yes	No	1
Slovak	5/97 (75/96)	No	No	No	No	No	0
Slovak	6/97 (23/96)	No	No	No	No	No	0
Slovak	7/97 (28/96)	No	Yes	No	Yes	No	1
Slovak	8/97 (19/97)	No	No	No	No	No	0
Slovak	9/97 (20/97)	No	No	No	No	No	0
Slovak	10/97 (6/96)	No	Yes	No	Yes	No	1
Slovak	11/97 (48/96)	No	Yes	No	Yes	No	1
Slovak	12/97 (26/96)	No	Yes	No	Yes	No	1
Slovak	13/97 (8/97)	No	No	No	No	No	0
Slovak	14/97 (8/96)	No	No	No	No	No	0
Slovak	15/97 (12/97)	No	No	No	No	No	0
Slovak	16/97 (47/96)	No	Yes	No	No	No	1
Slovak	17/97 (40/97)	No	No	No	No	No	0
Slovak	18/97 (59/97)	No	No	No	No	No	0
Slovak	20/97 (47/97)	No	Yes	No	No	No	1
Slovak	21/97 (9/96)	No	Yes	No	No	No	1
Slovak	22/97 (60/96)	No	No	No	Yes	No	1
Slovak	23/97 (61/96)	No	No	No	No	No	0
Slovak	24/97 (61/96)	No	No	No	No	No	0
Slovak	25/97 (30/97)	No	No	No	No	No	0
Slovak	26/97 (31/97)	No	No	No	No	No	0
Slovak	27/97 (65/97)	No	No	No	No	No	0
Slovak	28/97 (4/96)	No	Yes	No	No	No	1
Slovak	29/97 (5/97)	No	No	No	No	No	0
Slovak	31/97 (39/97)	No	No	No	No	No	0
Slovak	32/97 (32/97)	No	No	No	No	No	0
Slovak	33/97 (35/97)	No	No	No	No	No	0
Slovak	34/97 (43/97)	No	Yes	No	No	No	1
Slovak	35/97 (59/97)	No	No	No	No	No	0
Slovak	36/97 (63/970)	No	No	No	No	No	0
Slovak	37/97 (1/97)	No	No	No	No	No	0
Slovak	38/97 (3/97)	No	Yes	No	No	No	1
Slovak	39/97 (6/97)	No	No	No	No	No	0

Country	CaseID	Intl Juris	Intl Norm	ECJ	ECHR	Intl Court	Intl
Slovak	40/97 (18/97)	No	Yes	No	No	No	1
Slovak	41/97 (3/97)	No	Yes	No	No	No	1
Slovak	42/97 (18/97)	No	Yes	No	No	No	1
Slovak	43/97 (24/97)	No	Yes	No	No	No	1
Slovak	44/97 (29/97)	Yes	No	No	No	No	1
Slovak	45/97 (30/97)	No	No	No	No	No	0
Slovak	46/97 (36/97)	No	No	No	No	No	0
Slovak	47/97 (42/97)	No	No	No	No	No	0
Slovak	48/97 (46/97)	No	No	No	No	No	0
Slovak	49/97 (62/97)	No	Yes	No	No	No	1
Slovak	50/97 (64/97)	No	No	No	No	No	0
Slovak	51/97 (66/97)	No	No	No	No	No	0
Slovak	52/97 (67/97)	No	No	No	No	No	0
Slovak	53/97 (73/97)	No	Yes	No	No	No	1
Slovak	54/97 (75/97)	No	Yes	No	No	No	1
Slovak	55/97 (87/97)	No	No	No	No	No	0
Slovak	56/97 (87/97)	No	No	No	No	No	0
Slovak	57/97 (68/97)	No	No	No	No	No	0
Slovak	58/97 (98/97)	No	Yes	No	No	No	1
	<b>Intl Law</b>						46
	<b>Cases</b>						206
<b>Total Intl Law</b>							234
<b>Total Cases</b>							513

Table 6.2 summarizes the data by displaying the percent of decisions that referenced international law. This table illustrates the variance in both number of decisions and use of international law across countries.

**Table 6.2 Percent of Constitutional Court Cases Referencing International Law by Country**

Country	Total Decisions	Total Intl Law	Percent Intl Law
Czech Republic	138	118	85.5%
Poland	47	16	34%
Romania	122	54	42.2%
Slovak Republic	206	46	22.3%

### **6.1.2 *Transition to Democracy***

Transition to democracy, refers to the events involved in the creation of a new constitution. Constitutions form the 'rules of the game' for the country under democracy (Pruess, 1991). Consequently, this period establishes the de jure relationship between the constitutional court and legislature. The 'rules of the game' influences the de facto relationship between the constitutional court and legislature through entrenchment of the political power structure in force at that time (Pruess, 1991). In addition, other events may define the actual break with the previous regime, such as coup or peaceful change. However, these events do not necessarily reflect the ultimate political power configuration during creation of the new constitution. Therefore, they do not reflect whether the government, political, and legal structures are inclusive or exclusive. Since research shows a relationship between inclusive government and protection of rights (Finkel, 2004) the political structure formed after the break is more important than the actual method of breaking with the prior regime.

This section explains each country's transition to democracy. Each transition receives a rating of unilateral, mixed, or negotiated. A unilateral transition occurred when one group dominated the creation of the constitution. A mixed transition occurred when one group influenced the creation of the constitution more than other groups. A negotiated transition occurred when the creation of the constitution actively involved multiple groups.

Czech Republic: The drafting of the Czech Republic's post-communist constitution was a mix of both limited actors and a negotiated process. Actual drafting of the constitution occurred when both the Czech Republic and Slovakia were a single entity and a single group was in power (Zielonka, 2001). At the time the Slovaks dominated the government (Fitzmaurice, 1998). In addition, political elite from the prior regime could not participate in the current government (Hollis, 1999). Consequently, participation in the drafting of the constitution was limited (Hollis, 1999; Fitzmaurice, 1998). However, the goal was to produce a constitution that would be accepted and supported by both Czechs and



Slovaks (Fitzmaurice, 1998). This desire to produce a broadly accepted basis for government inherently required negotiation and limited the actors' ability to bias the rules in their favor (Fitzmaurice, 1998). Furthermore, the Czech Republic chose to revise, rather than draft a new, constitution (Fitzmaurice, 1998). This implies some level of negotiation with the prior regime even if it was in absentia (Fitzmaurice, 1998). The Czech Republic process is mixed.

Poland: In Poland the process of drafting a revised constitution is considered both negotiated and incremental (Fitzmaurice, 1998). Poland's independence from Soviet rule was a negotiated process, which then carried into subsequent actions to establish a democratic government including the drafting of the constitution (Zielonka, 2001). Furthermore, because control of the government alternated while the constitution was changed the process was inherently participatory (Fitzmaurice, 1998). Therefore, Poland is a case of a 'negotiated' transition.

Romania: Romania is the case that is most clearly a unilateral transition. A single group was in power during the creation of the post-communist constitution (Zielonka, 2001). This avoided the need to include a variety of actors in the process and negotiate differences (Zielonka, 2001). In addition, the political elite from the Soviet regime retained their political positions in the post-Soviet regime thus limiting the scope of changes included in the new constitutional order (Hollis, 1999).

Slovak Republic: Immediately after independence from Soviet control, Slovakia remained a part of Czechoslovakia until 1993 (Fitzmaurice, 1998). When Slovakia became an independent state, they chose to draft a new constitution (Fitzmaurice, 1998). Because Slovakia was ruled by a coalition, and one that was not considered stable, the process of drafting the new constitution by necessity involved broad participation and negotiation (Fitzmaurice, 1998). Therefore, Slovakia is a 'negotiated' transition.

Table 6.3 summarizes the transition and percent of cases referencing international law.. As this table shows, constitutional courts in the two countries with negotiated transitions have the least percent of references to international law in constitutional court decisions. This finding is consistent

with research positing that constitutional courts and their judicial review function are seen by those involved in a unilateral transition to ensure their protections in the future (Hirschl, 2004).

**Table 6.3 Transition, Constitutional Court Decisions Referencing International Law**

Country	Transition	Percent Intl Law
Czech Republic	Mixed	85.5%
Poland	Negotiated	34%
Romania	Unilateral	42.2%
Slovak Republic	Negotiated	22.3%

The qualitative rankings unilateral, mixed, and negotiated must be numeric to allow statistical comparison. Therefore, unilateral becomes 0, mixed becomes 1, and negotiated becomes 2

## 6.2 Analysis

Observing table 6.3 (above) it appears that negotiated transitions correlate with less use of international law. This would lead to the rejection of the third hypothesis. However, the data requires more rigorous testing to ensure that the visually perceived relationship is accurate.

As discussed in previous chapters, the type of relationship used depends on the characteristic of the variables. The third hypothesis has a clearly identified dependent variable, transition to democracy. The Somer's d statistics is appropriate for a binomial equation with a clearly defined dependent variable and variables that are at least ordinal (Hill and Lewicki, 2005; Johnson et al, 2001). Somer's d indicates the existence of a correlation between two variables (Hill and Lewicki, 2005; Johnson et al, 2001). It also indicates if the correlation is positive or negative and the strength of the relationship (Hill and Lewicki, 2005; Johnson et al, 2001). A positive correlation indicates that dependent and independent variables vary in the same direction (Hill and Lewicki, 2005; Johnson et al, 2001). When the relationship is negative the value of one variable increases while the other decreases (Hill and Lewicki, 2005; Johnson et al, 2001). Somer's d values range from 1.000 to -1.000 (Hill and Lewicki, 2005; Johnson et al, 2001). A Somer's d value of zero indicates that there is no correlation between the variables (Hill and Lewicki,

2005; Johnson et al, 2001). The strength of the correlation increases as the Somer's d value approaches 1 or -1 (Hill and Lewicki, 2005; Johnson et al, 2001).

The Somer's d statistic is -.600 with a significance of .003. This indicates a significant relationship (at the >.01 level). The correlation is moderately strong since it is -.6 in a range of 0 to -1 (Hill and Lewicki, 2005; Johnson et al, 2001). However, the relationship is negative. This means that use of international law in constitutional court decisions decreases as inclusion of additional groups increases during the transition to democracy. Again, this is consistent with research positing that when the transition is unilateral the group in power values the future protections afforded by constitutional courts (Hirschl, 2004).

Two corollaries to this hypothesis warrant testing. However, a more effective test involves additional cases with greater variance in governance and supranational influence. Table 6.4 presents the additional cases, the number of decisions, a count of cases referencing international law, and the corresponding percentage. While the majority of additional countries are post-communist countries of Eastern Europe, two are outliers. Peru is a democracy in Latin America. Cambodia is an authoritarian country in Asia. Both emerged from violent dictatorships. Consequently, the one commonality is that all countries included implemented constitutional courts as they transitioned out of a dictatorship.

**Table 6.4 Constitutional Court Decisions Referencing Intl. Law with Additional Countries**

Country	Decisions	Intl	Pct
Azerbaijan	149	90	60.4%
Belarus	184	83	45.1%
Bulgaria	266	52	19.5%
Cambodia	42	2	4.8%
Croatia	3718	1477	39.7%
Hungary	70	43	61.4%
Peru	21	5	23.8%

The first corollary is that *as constitutional court autonomy increases references to international law in constitutional court decisions increase*. The dependent variable is the reference to international

law in constitutional court decisions. The independent variable is constitutional court autonomy as measured in Chapter 4. To accommodate the various types of government Polity is the control variable. Since the measurement frequency is yearly this is a panel dataset and analyzed using a paneled ordered logit regression. Table 6.5 contains the results. Polity is the only statistically significant variable at the  $p < .05$  level. It has a negative relationship with constitutional court decisions referencing international law. The more consolidated a democracy the less likely the constitutional court cites international law in its decisions. This is consistent with the theory constitutional courts strategically use international law to legitimize their decisions when their autonomy is limited (Schimmelfennig, 2006). De facto constitutional court autonomy just misses statistical significance at the  $p < .05$  level. De jure constitutional court autonomy, constitutional protections for the court, is not statistically significant. However, none of the variables provide a strong impact with a one point change altering the occurrence of decisions with internal law by less than a point.

**Table 6.5 References to International Decisions**

	Coefficient	Error	Significance
De Facto	0.781	0.409343	0.056
Polity	-0.043	0.01762	0.014
De Jure	0.054	0.158564	0.737
Chi-Square	7.280		0.064
Dependent Variable: Decisions including references to international law			
Polity: Polity scores available at <a href="http://www.systemicpeace.org/polity/polity4.htm">http://www.systemicpeace.org/polity/polity4.htm</a> accessed January 14, 2014			
De Facto: De facto Constitutional Court autonomy			
De Jure: Constitutional protections of constitutional court autonomy			
N = 112			

The second corollary is that *increased reference to international law increases human rights protections*. This corollary builds on the hypothesis that constitutional courts use international human rights law to expand their ability to protect national human rights (Hirschl, 2004). The dependent variable is the CIRI human rights measure as defined in Chapter 4. The independent variable is percent of decisions referencing international law converted to an ordinal number (for example, 26% is 26).

Control variables are GDP, Polity, de facto constitutional court autonomy, and de jure constitutional court autonomy as defined in Chapter 4. The statistic used is a panel ordered logit regression. The results appear in Table 6.6.

There is not a statistically significant relationship between constitutional court decisions referencing international law and human rights. Furthermore, there is a negative relationship between the two variables. Constitutional courts in countries with poor human rights are more likely to reference international law in their decisions. As seen in Chapter 4, GDP is negatively correlated with human rights at a statistically significant  $p < .05$  level. Neither Polity nor de jure constitutional court autonomy display a statistically significant relationship with human rights. Furthermore, these four variables have a minimal impact with a one point change altering human rights less than one point. De facto constitutional court has the largest impact with a one-point change improving human rights by more than one point. In addition, it has a positive, statistically significant at the  $p < .005$  level, relationship with human rights.

**Table 6.6 International Decisions and Human Rights**

	Coefficient	Error	Significance
GDP	-0.601	0.262668	0.022
De Facto	1.394	0.477297	0.004
Polity	0.023	0.019516	0.244
De Jure	0.441	0.230451	0.055
Intl Decisions	-0.502	0.837077	0.549

Chi-Square            26.290                            0.0001

Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at  
<http://ciri.binghamton.edu/> accessed December 30, 2012

GDP source: Penn World Table available at <http://www.rug.nl/research/ggdc/data/penn-world-table> accessed January 14, 2014

Polity: Polity scores available at <http://www.systemicpeace.org/polity/polity4.htm> accessed January 14, 2014

De Facto: De facto Constitutional Court autonomy

De Jure: Constitutional protections of constitutional court autonomy

International Decisions: Decisions including references to international law

N = 112

As in the previous chapters, it is worth reviewing this model using GDP per capita. Table 6.7 presents the results. Although GDP per capita retains the negative relationship with human rights and has a greater impact (a one point change results in over a one point change in human rights), it is no longer statistically significant at the  $p < .05$  level. The impact of de jure constitutional court autonomy increases slightly although it remains below a one-point change to human rights. The statistical significance of de jure constitutional court autonomy increases. The statistical significance of the other variables decrease as does their impact.

**Table 6.7 International Decisions and Human Rights with GDP per capita**

	Coefficient	Error	Significance
GDP per capita	-1.096	0.854629	0.200
De Facto	1.222	0.50083	0.015
Polity	0.016	0.019095	0.399
De Jure	0.673	0.278728	0.016
Intl Decisions	-0.311	0.850559	0.715
Chi-Square	22.980		0.0003
Dependent Variable: CIRI Source: CIRI Human Rights Data Project available at <a href="http://ciri.binghamton.edu/">http://ciri.binghamton.edu/</a> accessed December 30, 2012			
GDP source: Penn World Table available at <a href="http://www.rug.nl/research/ggdc/data/penn-world-table">http://www.rug.nl/research/ggdc/data/penn-world-table</a> accessed January 14, 2014			
Polity: Polity scores available at <a href="http://www.systemicpeace.org/polity/polity4.htm">http://www.systemicpeace.org/polity/polity4.htm</a> accessed January 14, 2014			
De Facto: De facto Constitutional Court autonomy			
De Jure: Constitutional protections of constitutional court autonomy			
International Decisions: Decisions including references to international law			
N = 112			

### 6.3 Discussion

Both the statistical and visual analysis of the data rejects the third hypothesis, *constitutional courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral*. This analysis indicates that the opposite is occurring. The fewer political groups involved in the transition to democracy, particularly the creating of the constitution, the more likely constitutional courts will reference international law in their decisions.

This seems to contradict research arguing that rights protections increase when the constitution creating process is more inclusive (Finkel, 1994; Pruess, 1991). However, two bodies of research support this finding.

First, research posits that legislatures are more likely to comply with constitutional court decisions based on international obligations (Arden, 2008). As argued above, when one group dominates the political transition to democracy they are likely to structure the political and legal system to protect their interests (Pruess, 1991; Sajo, 1995). A possible explanation for the results of this test is that decisions referencing international law challenge the political power of the legislature. In such a situation, the constitutional court might use international law to justify their actions.

Second, constitutional courts need to protect their legitimacy since they have no concrete enforcement methods at their disposal (Schimmelfennig, 2006). To ensure the legitimacy of their decisions constitutional courts rely on legal reasoning (Schimmelfennig, 2006). Constitutional courts may refer to international law to support their legal reasoning (Schimmelfennig, 2006). In addition, reliance on legal reasoning, and international law, is a way constitutional courts could increase their autonomy vis-à-vis the legislature (Schimmelfennig, 2006). Since research indicates transitions to democracy dominated by a single group results in political and legal systems structured to protect their interests, the resulting constitutional court could use international law to protect and expand their legitimacy.

The corollaries serve to validate the role of international law in constitutional court decisions. Combined the corollaries indicate that there is a negative relationship between human rights protections, democracy, and the use of international law in constitutional court decisions (Schimmelfennig, 2006; Hirschl, 2004). Although not surprising, this dissertation presents quantifiable, statistically significant, support for these theories.

## 6.4 Conclusion

This chapter tested the third hypothesis; *constitutional courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral*. Although rejecting this hypothesis, the test supported accepting the opposite, *constitutional courts in countries with a unilateral transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was negotiated*.

Two important points for better understanding the research question result from this finding. The research question seeks to understand whether constitutional courts protect rights by reducing the autonomy of the legislature. This test shows first that constitutional courts in countries where the 'rules of the game' under democracy were unilaterally established are more likely to reference international law in their decisions. Existing research posits that this may result from the constitutional court attempting to protect its legitimacy or ensure legislative compliance with the decisions (Schimmelfennig, 2006; Finkel 1994; Pruess, 1991). Both explanations indicate an effort by the constitutional court to ensure legislative compliance with its decisions. Since constitutional courts overturn legislative actions, this is an explanation of how constitutional courts reduce the autonomy of the legislature.

Second, the results of this test indicate that international human rights law is important to protection of rights by national constitutional courts. Existing research posits that the structure of governments created by a dominant political protect their interests (Pruess, 1991; Sajo, 1995). The resulting political and legal systems also ensure the continued dominance by such groups (Pruess, 1991; Sajo, 1995). In this situation, the legislature has little incentive to extend human rights protections, particularly when they threaten the dominant political powers. However, by using international human rights law in their decisions constitutional courts provide incentive to the legislature.



## 7 CONCLUSION

This dissertation seeks to explain why national constitutional courts can influence national legislatures in the name of human rights. Through the test of three hypotheses, this dissertation advanced understanding of the relationship between national constitutional courts and legislatures in the pursuit of human rights protections. Additional areas of research to further our understanding of this topic also emerged.

This chapter reviews the findings of this dissertation and presents avenues for further research. The first section briefly reviews the research question and hypotheses. In the second section is a summary hypotheses test results. The third section presents avenues for future research.

### 7.1 Research Question and Hypothesis

This dissertation started with three examples where the appointed constitutional court overruled acts of the popularly elected legislature to protect human rights. These cases demonstrate the ability of the constitutional court to limit the actions of the legislature. The constitutional court's influence over the legislature further increases as the legislature considers past and future constitutional court decisions as they create new laws. To what extent does the constitutional court affect the autonomy, or freedom to act, of the legislature to protect human rights?

Three hypotheses test different aspects of potential answers to this research question. The first hypothesis, that increasing constitutional court autonomy increases the protection of human rights, tests the basic premise underlying the research question. This hypothesis tests whether the human rights benefit from increasing constitutional court autonomy over the legislature. The basis for this hypothesis is research positing that constitutional courts are becoming niche vendors for human rights protections (Alter, 2001; Conant, 2001). This dissertation posits that to gain respect as a protector of human rights constitutional courts must affect the autonomy of legislatures. Impacts to legislative

autonomy include overruling legislative actions and providing guidelines for designing laws. This hypothesis seeks to demonstrate that the more a constitutional court protects human rights the more the legislature is constrained in its actions.

The second hypothesis, that as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures, explores the relationship between supranational constraints, constitutional courts, and legislatures. This hypothesis builds on research posting an increase in legal, as opposed to political, resolution of disputes (Gearty, 2006; Finnemore, 2003). It also builds on Stone's research (1990) indicating both a direct and indirect influence on constitutional courts. This hypothesis posits that the external human rights dialogue translates into the constitutional court influencing the legislature both directly and indirectly.

Finally, the third hypothesis, Constitutional courts in countries with a negotiated transition to democracy will use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral, tests the relationship between the formation of the government during the transition to democracy and the constitutional court's influence over the legislature. This hypothesis also builds on work regarding the increased legalization of disputes (Gearty, 2006; Finnemore, 2003). However, this hypothesis assesses the political and legal culture resulting from the transition to democracy. This hypothesis posits that where the transition to democracy was inclusive, thus ensuring a dialogue among political factions, constitutional courts use international human rights law to protect and extend human rights.

## **7.2 Hypothesis Results**

The results of testing the hypothesis increased our understanding of the relationship between the constitutional court, the legislature, and human rights. Each of the three hypotheses provided a unique, and important, insight.

The test of the first hypothesis, that increasing constitutional court autonomy increases the protection of human rights, demonstrated the value of limiting both constitutional court and legislative autonomy. The findings indicate that increased constitutional court autonomy, particularly allowing them to set their own processes, correlates to increased human rights protections. This limits legislative autonomy because it increases the ability to have legislative actions overturned. However, constitutional protections ensuring constitutional court autonomy were neither necessary nor sufficient to ensure human rights protections. This indicates that limiting some areas of constitutional court autonomy, and increasing legislative autonomy in those areas, is important. In other words, increased human rights protections seem to benefit from limits on both legislative and constitutional court autonomy.

The test of the second hypothesis, that as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures, indicates a correlation between effective (i.e. include strong incentives for compliance and disincentives if ignored) supranational constraints and increased constitutional court constraints on the legislature. Testing of two corollaries further clarified this relationship. The first corollary, that as constitutional court constraints on the legislature increase human rights protections increase, demonstrated a negative correlation between constitutional court constraints on the legislature and the protection of human rights. Testing the second corollary, that as supranational constraints increase human rights protections increase, reinforced the finding that effective constraints benefit human rights protections. The combination of these results indicates that there is no easy answer to the protection of human rights.

Finally, the test of the third hypothesis, constitutional courts in countries with a negotiated transition to democracy use international human rights law in their decisions more than constitutional courts in countries where the transition to democracy was unilateral, indicates a reverse correlation.

Constitutional courts in countries with a unilateral transition to democracy issued more decisions using international human rights law. One explanation is that these constitutional courts use more international human rights law for one of two reasons. First, they rely on international human rights law to increase their legitimacy (Schimmelfennig, 2006). Alternately, the constitutional courts use international human rights law to ensure legislative compliance (Arden, 2008).

### 7.3 Additional Considerations

One of the arguments presented earlier in this dissertation was that context is important. Consequently, the results presented require additional information about the countries to ensure correct interpretation.

One consideration is perceptions of judicial corruption and the perceived legitimacy of the judiciary. The constitutional court is, after all, a judicial institution. Consequently, negative perceptions of the judiciary affect the functioning of the constitutional court as well as other national courts. One aspect is judicial corruption. There is variance in the perceived judicial corruption between the four key cases. In 2009 94% of respondents in Romania perceived corruption in the judiciary versus 85% in Poland and 77% in the Czech Republic.<sup>43</sup> Another aspect is trust in the judiciary. In October 2004 the Eurobarometer included a question on trust in the national judiciary. According to this survey, 77% of Polish respondents tended not to trust the national judiciary compared to 65% of Slovak respondents, 63% of Romanian respondents, and 61% of Czech respondents.<sup>44</sup> There was some improvement by November 2010. At that time 51% of Polish respondents, 62% of Czech respondents, 65% of Slovakian

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<sup>43</sup> Based on Transparency International's Global Corruption Barometer 2009 available at [http://archive.transparency.org/policy\\_research/surveys\\_indices/gcb/2009](http://archive.transparency.org/policy_research/surveys_indices/gcb/2009) accessed January 27, 2014. The percentage includes responses of 3, 4, and "extremely corrupt" to the question "To what extent is this category affected by corruption in your country: Judiciary?" There was no data available for the Slovak Republic.

<sup>44</sup> Based on Eurobarometer Survey available at [http://ec.europa.eu/public\\_opinion/cf/showchart\\_column.cfm?keyID=2196&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.11](http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.11) accessed January 27, 2014. Responses to 'Trust in Institutions' question and "National legal system" subcategory.

respondents, and 68% of Romanian respondents did not trust the judiciary.<sup>45</sup> A final aspect is the comparison of the national judiciary to other judiciaries. A 2013 European Union report showed that 55% of Czech, 58% Slovakian, 60% Polish, and 69% Romanian respondents felt their national judiciary was worse than that of other European countries.<sup>46</sup>

To determine the ability of the constitutional court to influence the parliament compare the trust in the national parliament. Based on the Eurobarometer the percent tending not to trust the national parliament in October 2004 were 87% Polish, 75% Czech, 67% Slovakian, and 60% Romanian respondents.<sup>47</sup> Perceptions of the national parliament deteriorated. In June 2010 when 86% Czech, 85% Romanian, 69% Polish, and 56% Slovak respondents tended not to trust the institution.<sup>48</sup>

This context is particularly helpful when considering constitutional court references to international law. Table 7.1 adds to the information presented in Table 6.2 to include the 2010 lack of trust in the judiciary and parliament. This shows that the use of international law in constitutional court decisions roughly trends with lack of trust in the parliament. Figure 7.1 presents a visual representation of this data.

**Table 7.1 Constitutional Court References to Intl. Law, Judicial and Parliamentary Trust**

Country	Percent Intl Law	Judicial Trust	Parl Trust
Czech	85.50%	62%	86%

<sup>45</sup> Based on Eurobarometer Survey available at [http://ec.europa.eu/public\\_opinion/cf/showchart\\_column.cfm?keyID=2196&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.11](http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2196&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.11) accessed January 27, 2014. Responses to “Trust in Institutions” question and “National legal system” subcategory.

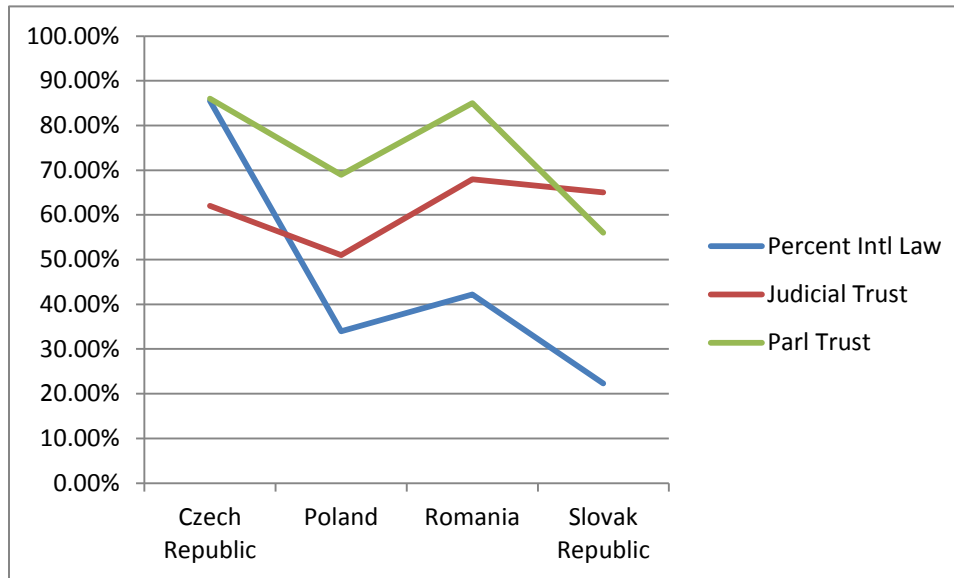
<sup>46</sup> Based on *Justice in the EU* available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_385\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_385_en.pdf) accessed January 27, 2014. This represents the “Total Worse” response to the question “In general how would you rate the justice system in (OUR COUNTRY) compared to other justice systems in the EU?”

<sup>47</sup> Based on Eurobarometer Survey available at [http://ec.europa.eu/public\\_opinion/cf/showchart\\_column.cfm?keyID=2192&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.06](http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2192&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.06) accessed January 27, 2014. Responses to “Trust in Institutions” question and “National Parliament” subcategory.

<sup>48</sup> Based on Eurobarometer Survey available at [http://ec.europa.eu/public\\_opinion/cf/showchart\\_column.cfm?keyID=2192&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.06](http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2192&nationID=17,24,29,26,&startdate=2004.10&enddate=2010.06) accessed January 27, 2014. Responses to “Trust in Institutions” question and “National Parliament” subcategory.

Republic			
Poland	34%	51%	69%
Romania	42.20%	68%	85%
Slovak Republic	22.30%	65%	56%

Trust in Judiciary and Parliament Source: Eurobarometer



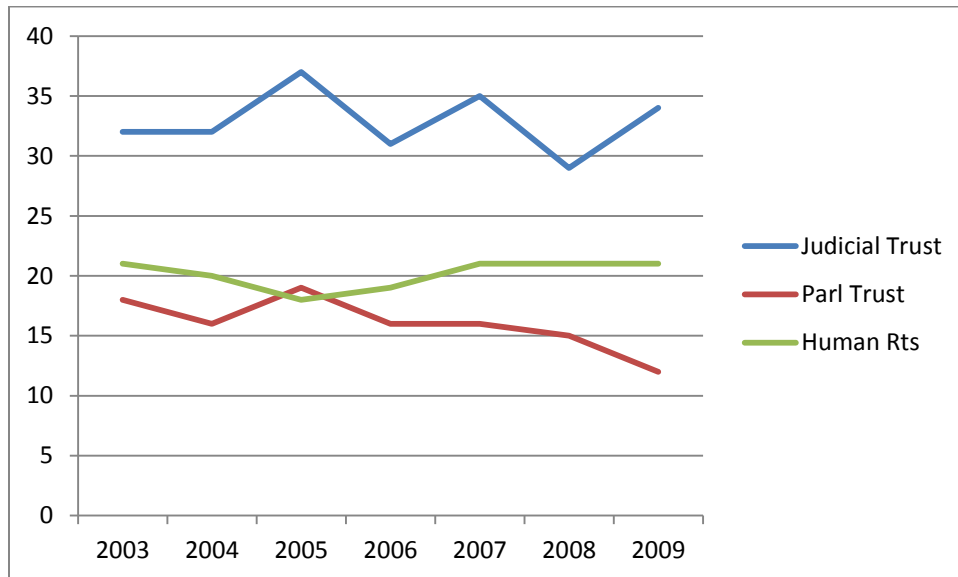
**Figure 7.1 Constitutional Court References to Intl. Law, Judicial and Parliamentary Trust**

This context opens a new possibility for use of international law in constitutional court decisions. Rather than the constitutional court using international law to legitimize its decisions, it may be using international law to counter lack of trust in the lawmaking institution.

It is also possible that trust in the judiciary and parliament relate to the constitutional court's ability to constrain parliament. Hirschl (2004) argues that high court active in protecting rights unintentionally undermines its own legitimacy. His research on countries in the Westminster tradition supports this hypothesis (Hirschl, 2004). Since post-communist countries share, at least initially, the skepticism of the judiciary with the Westminster tradition it is possible that his hypothesis is also applicable to the cases in this dissertation. On the other hand, the perception is that constitutional courts will protect democracy and human rights (Albi, 2009). Therefore, in the post-communist Central

European context the legitimacy of constitutional courts, along with their ability to influence human rights and the legislature, would increase as they demonstrate their usefulness (Schimmelfennig, 2006).

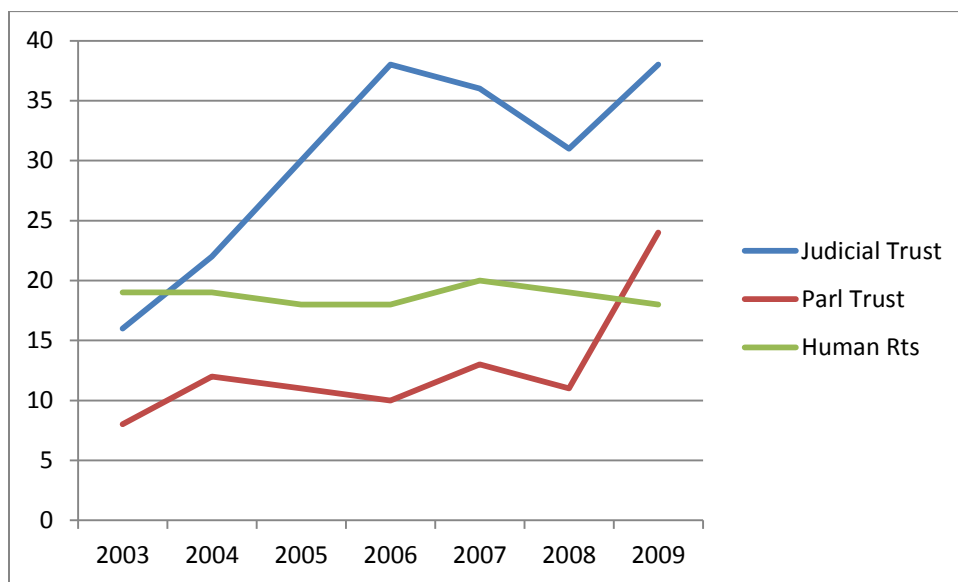
Figures 7.2 through 7.5 illustrate the relationship between human rights and trust in the judiciary and parliament. For the purposes of these Figures institutional trust lags one year.



Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

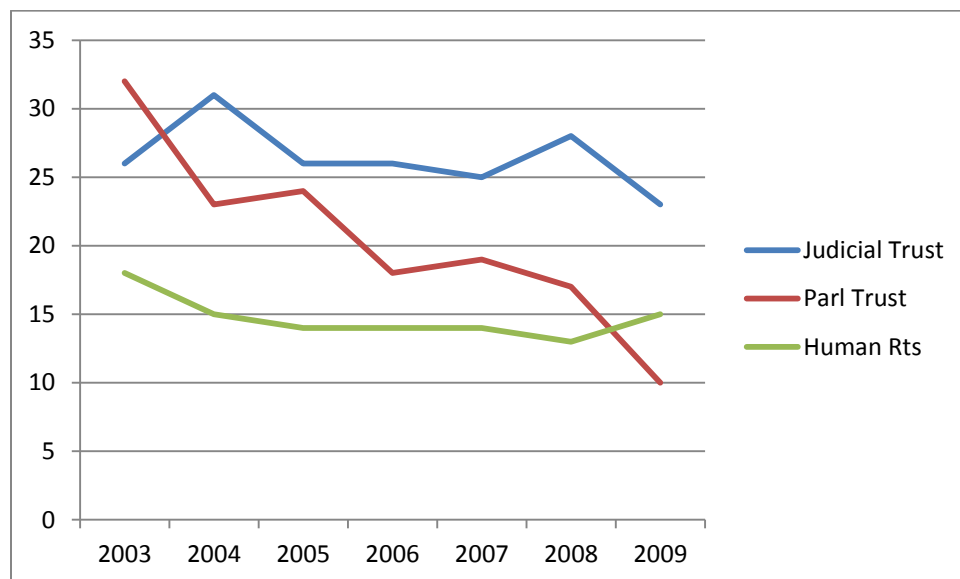
**Figure 7.2 Czech Republic – Judicial Trust, Parliament Trust, and Human Rights**



Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

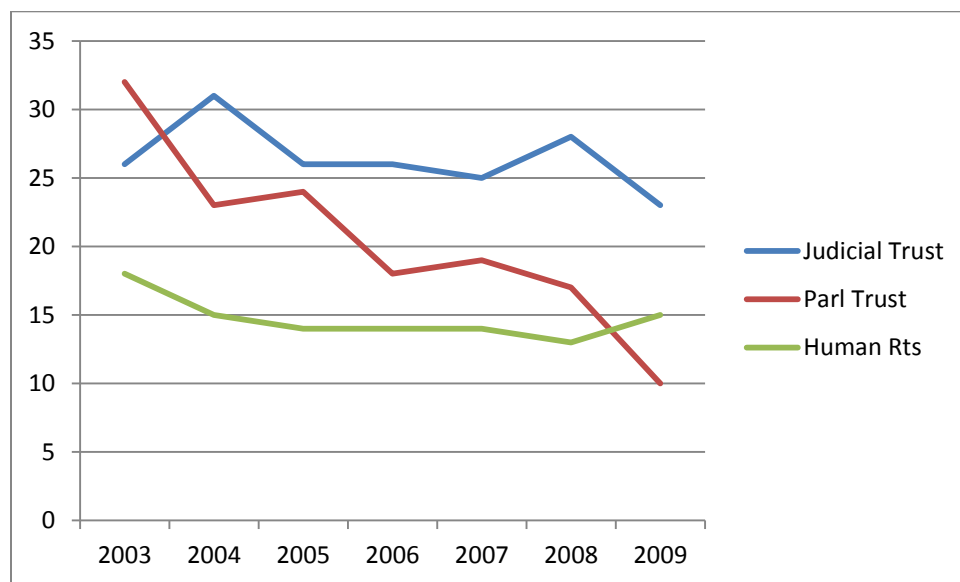
**Figure 7.3 Poland – Judicial Trust, Parliament Trust, and Human Rights**



Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

**Figure 7.4 Romania – Judicial Trust, Parliament Trust, and Human Rights**





Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

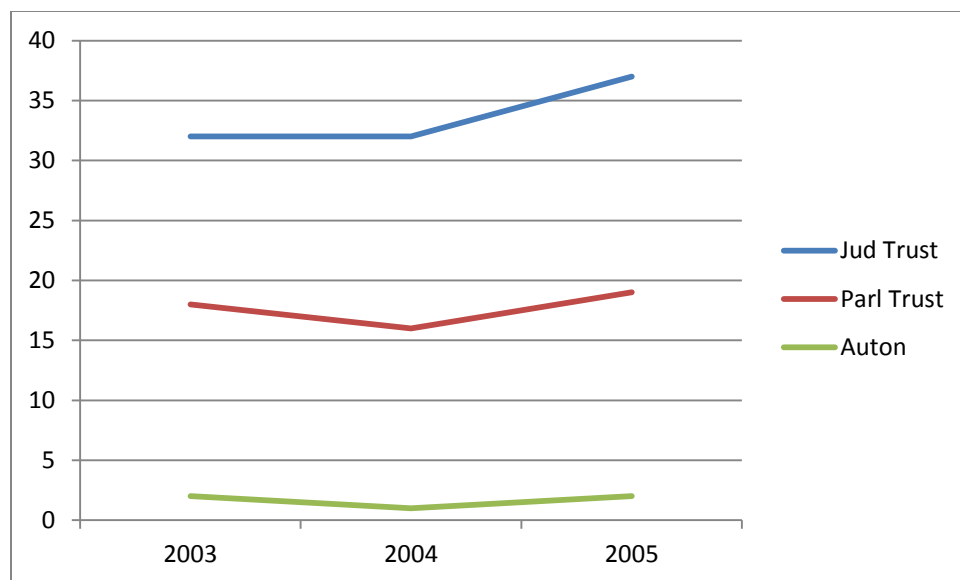
Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

**Figure 7.5 Slovak Republic – Judicial Trust, Parliament Trust, and Human Rights**

Although no obvious correlation between human rights and either trust measure, human rights trends closer to trust in the judiciary than trust in the parliament. It is important to note that the Eurobarometer measures trust in the judiciary not specifically the constitutional court. Since European courts at all levels have the ability to protect human rights (Koopmans, 2003), this is not an explanation for the results in this dissertation. However, it serves to contextualize the findings.

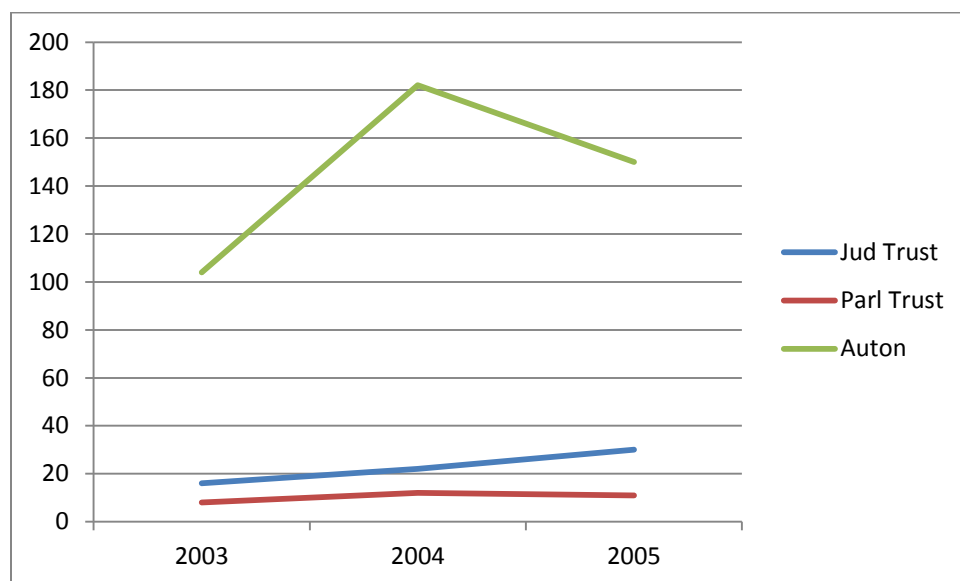
Another way of looking at the context of judicial and parliamentary trust is whether it influences the ability of the constitutional court to constrain the legislature. Figures 7.6 through 7.9 illustrate this relationship.

Once again, there is no clear correlation. However, the ability of the constitutional court to constrain the legislature more closely tracks with the trust in the parliament than in the judiciary. This is particularly noticeable where there are significant gaps between trust in the judiciary and constitutional constraints on the legislature. When judicial trust is higher, constitutional constraints on the legislature are lower and vice versa.



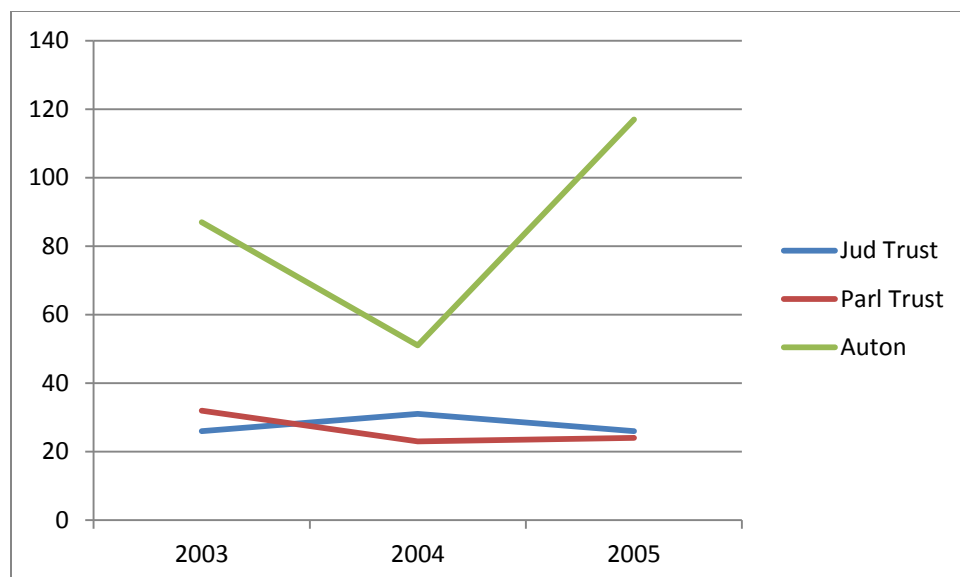
Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014  
 Auton represents constitutional court constraints on the legislature

**Figure 7.6 Czech Republic – Judicial Trust, Parliament Trust, Constitutional Court Constraints**



Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014  
 Auton represents constitutional court constraints on the legislature

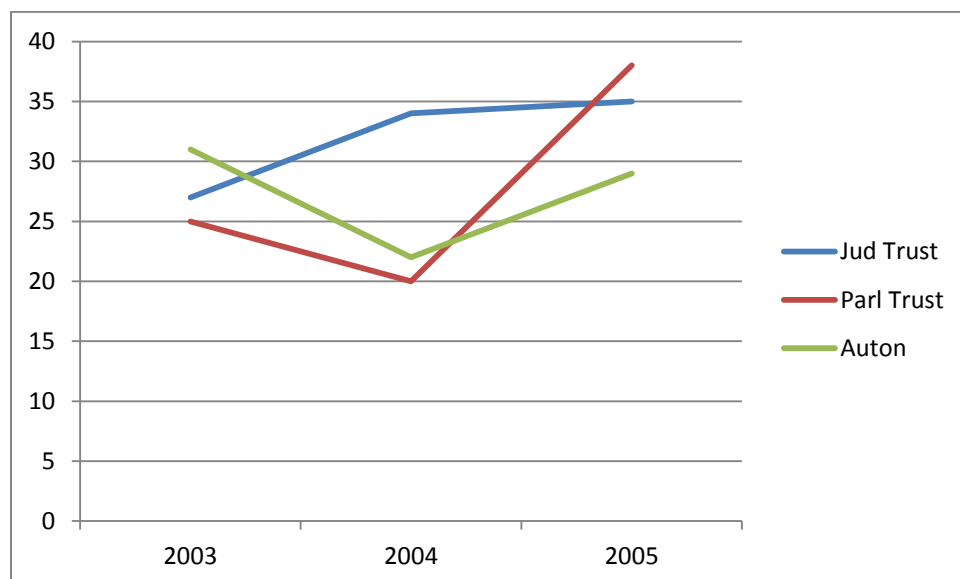
**Figure 7.7 Poland – Judicial Trust, Parliament Trust, Constitutional Court Constraints**



Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

**Figure 7.8 Romania – Judicial Trust, Parliament Trust, Constitutional Court Constraints**



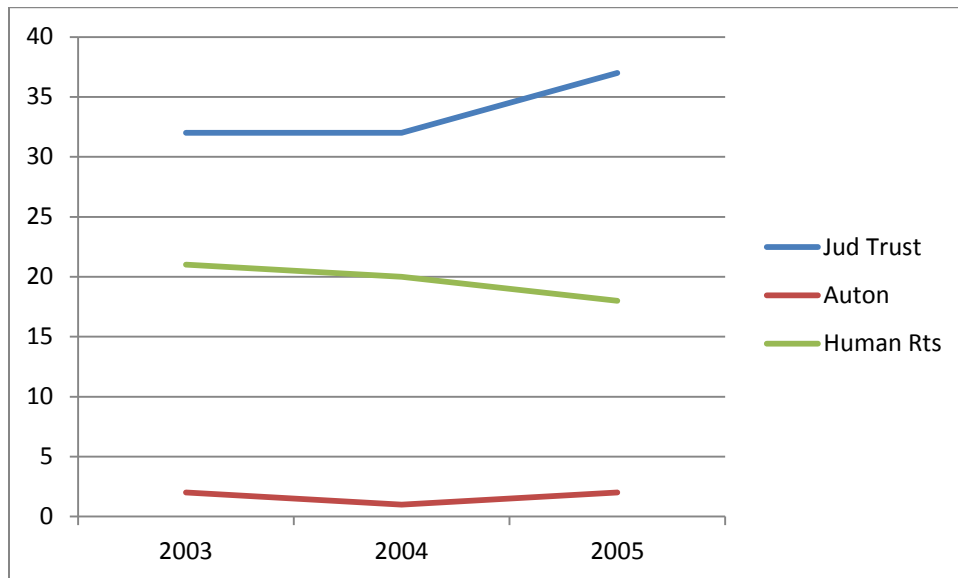
Judicial and Parliament Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

**Figure 7.9 Slovak Republic – Judicial Trust, Parliament Trust, Constitutional Court Constraints**

Tables 7.10 through 7.13 visualize the relationship between trust in the judiciary, constitutional court constraints on the legislature, and human rights. Although no clear pattern emerges, with the

exception of the Slovak Republic human rights trend closer to constitutional court constraints on the legislature than trust in the judiciary.

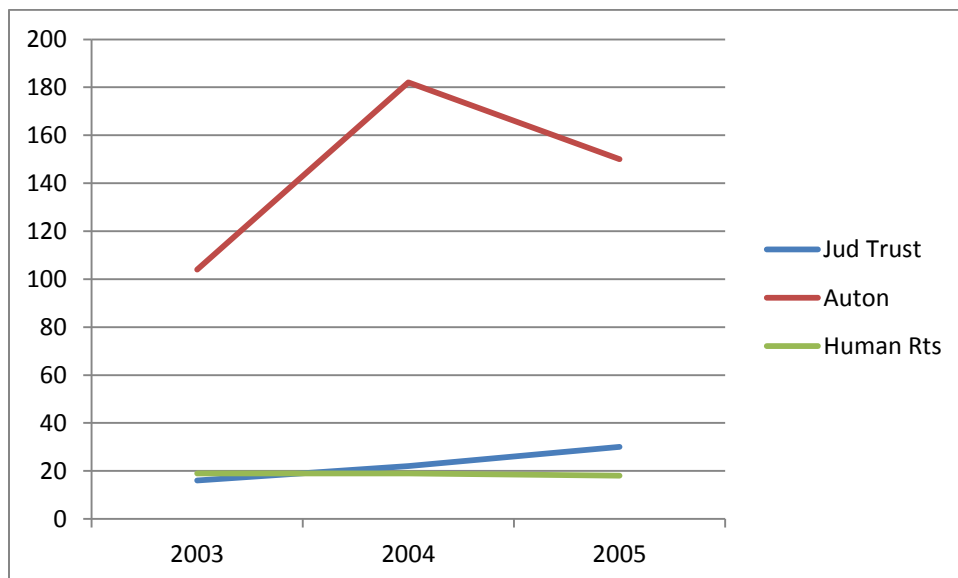


Judicial Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

**Figure 7.10 Czech – Judicial Trust, Constitutional Court Constraints, and Human Rights**

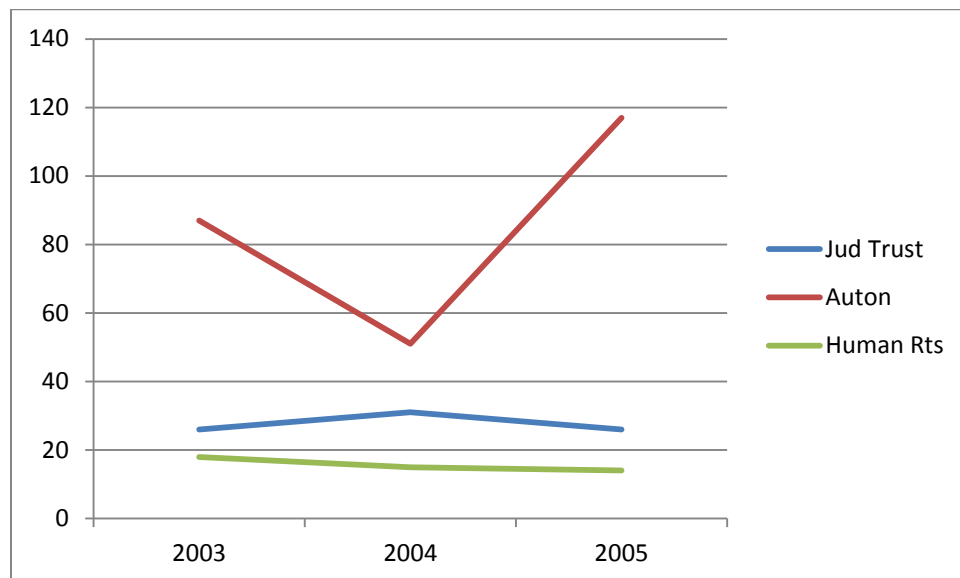


Judicial Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

**Figure 7.11 Poland – Judicial Trust, Constitutional Court Constraints, and Human Rights**

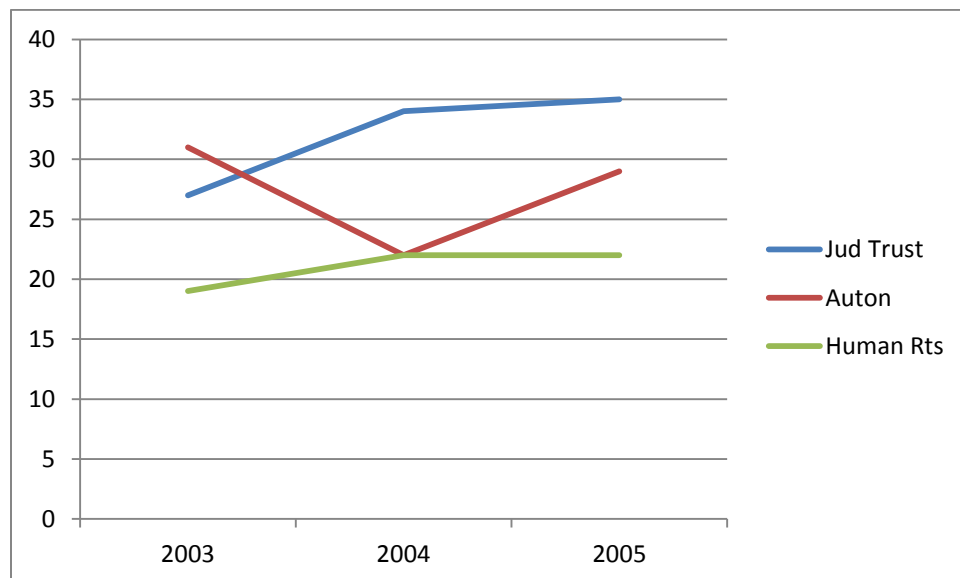


Judicial Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

**Figure 7.12 Romania – Judicial Trust, Constitutional Court Constraints, and Human Rights**



Judicial Trust Source: Eurobarometer available at [ec.europa.eu/public\\_opinion/cf/index\\_en.cfm](http://ec.europa.eu/public_opinion/cf/index_en.cfm) accessed January 27, 2014

Auton represents constitutional court constraints on the legislature

Human Rights Source: CIRI Human Rights Data Project available at <http://ciri.binghamton.edu/> accessed December 30, 2012

**Figure 7.13 Slovak – Judicial Trust, Constitutional Court Constraints, and Human Rights**

While this data is limited and does not allow generalizations, it does allow additional context for the findings in this dissertation. The results of these cases do not provide information that will apply to a broad range of situations. However, despite their unique situations the information provides insight that will help assess other situations. Most importantly, it shows that protecting human rights is not as easy as having a country agree to international treaties, or instituting a constitutional court, or constraining the majoritarian voice of the legislature. It demonstrates that there is a complex relationship between all of these factors, as well as their parts, which need to be evaluated in the context of institutional trust.

#### **7.4 Impact on Research Questions**

The research question asks what allows constitutional courts to constrain the autonomy of legislatures in the protection of human rights. The answer to this question requires three steps. The first step verifies that constitutional courts constrain the autonomy of legislatures. More specifically, this step looks for a correlation between constitutional court constraints on the legislature and increased human rights protections. The second step determines how this is accomplished. In other words, it looks for ways that the constitutional court can constrain the legislature. The final step assesses the impact of these constraints on human rights.

The results of the hypotheses tests address these three points. The first point is whether constitutional courts constrain the autonomy of the legislature. Tests of the second hypothesis, *as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures*, demonstrate that national constitutional courts do constrain national legislatures. Information from the legislative debates demonstrates this in two ways. First, quantitative analysis indicates a statistically significant

correlation between constitutional court constraints on the legislature and the protection of human rights. Second, statements in the legislative debates indicate consideration of constitutional court past and future decisions. Because legislatures consider the actions of constitutional courts, they are constrained in their ability to act.

Second, the tests of all three hypotheses provide insight into how constitutional courts are able to constrain national legislatures. Tests of the first hypothesis, that *increasing constitutional court autonomy increases the protection of human rights*, indicates the importance of the constitutional court and legislature to check each other's actions. In other words, the separation of powers among branches of government improves the protection of human rights. Furthermore, the results indicate the importance of both de facto and de jure constraints. Tests of the second hypothesis, *as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures*, indicate an influence of effective supranational constraints. Increased supranational constraints correlate with the increased ability of constitutional courts to influence legislative behavior. Finally, tests of the third hypothesis, *as supranational constraints intended to increase the consolidation of democracy and protection of human rights increase, national constitutional courts increase constraints on national legislatures*, indicate constitutional courts created under exclusive conditions are more likely to use international law in their decisions. In other words, when a single group creates the rules of the game the constitutional court is more likely to base their decisions on international law. Taken together, these results indicate that supranational influences, such as supranational constraints and international law, combine with the separation of powers to enable constitutional courts to influence national legislatures.

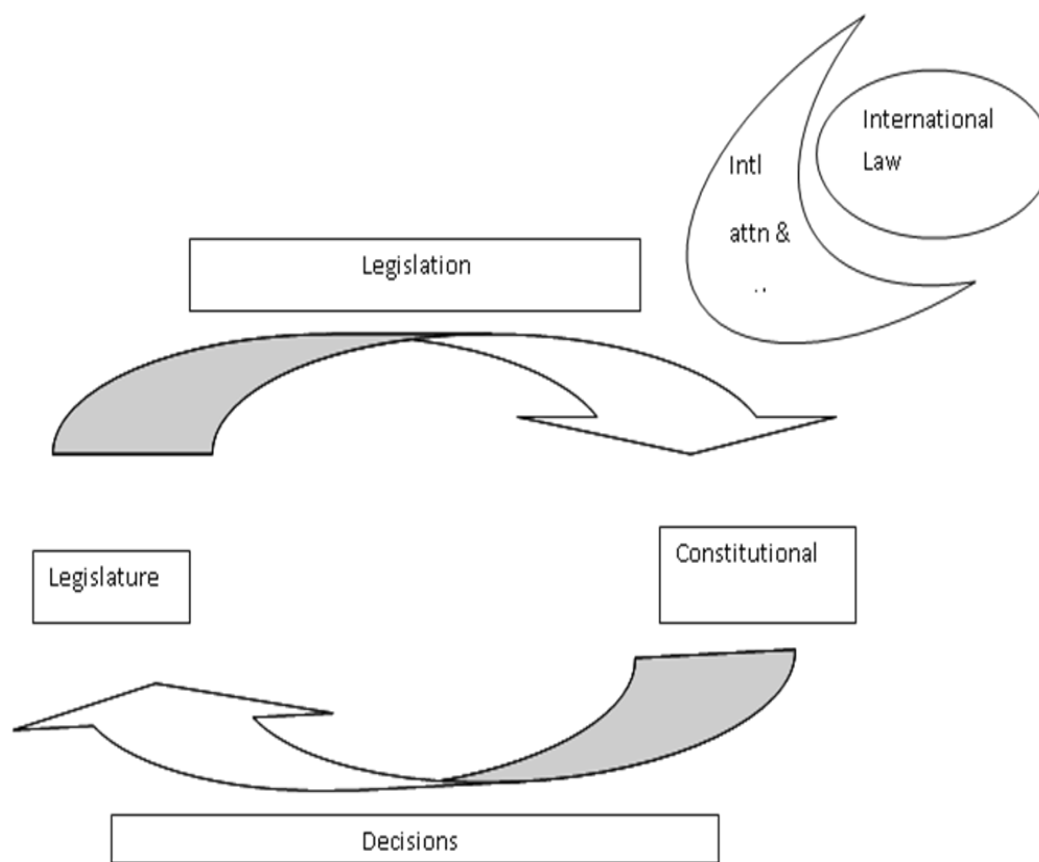
Third, the testing the first hypothesis indicates that both constitutional court constraints on national legislatures and legislative constraints on constitutional courts correlate with increased protections of human rights. This substantiates the importance of both separation of powers and

checks and balances. Furthermore, tests of the second and third hypothesis indicate the importance of international influences in the protection of human rights. This validates the efforts of both international law and organizations such as the European Union.

Figure 2.1 from Chapter 2 (reproduced here as Figure 7.14) provides an illustration of these findings. The feedback loop between the constitutional court and legislature indicates the checks and balances between the two institutions. Results of the first hypothesis testing support this process. International influences, filtered through national circumstances reflect the findings of the remaining hypotheses. As tests of the second hypotheses demonstrate, supranational constraints filtered through constitutional court constraints on the legislature impact human rights. However, supranational constraints do not correlation directly with increased protections of human rights. Tests of the third hypothesis indicate that constitutional court decisions are more likely to reference international law when the transition to democracy is less inclusive. Once again, this indicates a filtering of international influences by the constitutional court.

In answer to the research question, both the democratic idea of checks and balances and international influences allow constitutional courts to constrain national legislatures as they protect human rights. Furthermore, the correlation of these factors to increased protections of human rights indicates the important role of constitutional courts in the protection of human rights.





**Figure 7.14 Constitutional Court Interactions**

## 7.5 Relation to Existing Research

In Chapter Two this dissertation reviews three areas of existing research. The first explains judicial autonomy in relation to judicial independence. This resulted in two conclusions. First, that some amount of judicial independence is necessary to protect human rights (Staton et al, 2010; Keith, 2002). Tests of the first hypothesis substantiate this conclusion. Second, democracies benefit from less than complete independence for the judiciary (Finn, 2004). Tests of the first hypothesis also support this position. Consequently, the findings of this dissertation support an autonomous judiciary that

decides without influence but is subject to checks against abuse by the legislature (Staton et al, 2010, Rios-Figueroa and Staton, 2009; Finn, 2004). Substantiating this are the findings that a *de jure* autonomous constitutional court whose decisions are subject to review by the legislature correlates with increased human rights protections.

The next area of research reviewed involved interactions between constitutional courts and legislatures. This review found several areas of research lacking. The first was the impact of the interactions between constitutional courts and legislatures and human rights. The findings presented here indicate that interactions between constitutional courts and legislatures benefit the protection of human rights. In particular, legislative checks on the constitutional court and constitutional court constraints on the legislature both correlate with increased protections of human rights. Chapter Two also stated that existing research said little about the context of the use of international law. This dissertation demonstrates that constitutional courts use international law in their decisions more frequently when there was little inclusion in the constitution drafting process. Finally, this section identified the lack of research on the supranational impact on institutional autonomy. This dissertation demonstrates that supranational influences filter through the constitutional court enabling it to constrain the legislature. It further demonstrates that the supranational impact on the protection of human rights is indirect rather than direct.

Finally, Chapter Two reviews the five authors directly influencing the hypotheses in this dissertation. The first work reviewed in this section is Schimmelfennig (2006). Schimmelfennig (2006) posited that national constitutional courts defend their jurisdiction by becoming protectors of human rights. Two findings of this dissertation reflect Schimmelfennig's work (2006). This dissertation indicates that constitutional courts filter international constraints through to the national legislature to increase protection of human rights. When the transition to democracy was less inclusive constitutional courts increase the use of international human rights law in their decisions. Together these findings

support Schimmelfennig's (2006) view that national constitutional courts use tools available to them to increase human rights protections. This dissertation does not address whether constitutional courts are better protectors of human rights than other available options. Nor does it address the perceived ability of constitutional courts to protect human rights. However, by demonstrating that constitutional courts position themselves between the national and international this dissertation advances our understanding of the constitutional court's protection of human rights.

Chapter Two also examines the work of Maveety and Grosskopf (2004). This research posited that constitutional courts work at the national and international level (Maveety and Grosskopf, 2004). As mentioned above, this dissertation demonstrates that constitutional courts filter international constraints into national protection of human rights. Furthermore, it demonstrates that constitutional courts respond to international influences, in the form of international constraints and international law. Consequently, this dissertation fully supports Maveety and Grosskopf's (2004) work.

Stone's (1990) research posited that past, present, and future decisions of constitutional courts alter the legislative process. This dissertation supports Stone (1990) both quantitatively and qualitatively. Tests of the second hypothesis quantitatively correlate increased protections of human rights with increased constitutional court constraints on national legislatures. Furthermore, qualitative review of legislative debates indicates that national legislatures consider constitutional court decisions in three ways. First, legislatures change legislation in response to current rulings of the constitutional courts. Second, as they debate new legislation the legislatures consider compliance with past rulings of the constitutional court. Finally, legislators threaten, and use, constitutional court review of legislation to alter laws to their policy preferences.

Finally, this dissertation builds on Finnemore's (2003) work on the legalization of issues. This is particularly relevant in post-communist Europe where demand for the protection of individual rights was not common to the legal culture (Sajo, 1995). This dissertation offers limited evidence to support

an increased legal demand for the protection of human rights. The most compelling evidence is the increased reference to constitutional court decisions in Romania and Poland.<sup>49</sup>

Although this dissertation improves understanding of the role of constitutional courts, legislatures, and human rights additional research is needed.

## **7.6 Future Research**

Based on the results in this dissertation, two areas need additional research. The first is the role of human rights advocates in constitutional court cases. Since constitutional courts require a case before they can protect human rights, it is important to understand the impact of strategic litigation on the circumstances studied in this dissertation. Are there national circumstances that support human rights litigation? Do litigants need to present international human rights law before the constitutional court is aware of it?

Second, more research is needed on why legislatures take cases to the constitutional courts. The legislative debates clearly indicated that legislators use the threat of constitutional court action in two ways. When drafting legislation, they consider what challenge at the constitutional court are possible and by whom. They then either choose to address the problems before passing the legislation or leave the possibility open. Alternately, one group may threaten a challenge if a particular point is, or is not, included in the legislation.

## **7.7 Conclusion**

Do constitutional courts decrease legislative autonomy to protect human rights? This is the research question underlying this dissertation. Based on the testing of the hypotheses this dissertation makes two contributions to the answer of this question. First, constitutional courts do limit the actions of the legislature thus limiting their autonomy or freedom to act. For the constitutional court to ensure

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<sup>49</sup> See Table 5.1

human rights protections, this dissertation demonstrates that broad access to the constitutional court is important. In other words, the ability to raise issues to the constitutional court should be open to every citizen not just particular actors. This increases the likelihood that legislative actions will be overturned. However, this dissertation also indicates that checks on the constitutional court's autonomy are also important.

Second, constitutional court limits on legislative autonomy can protect human rights when a single political faction dominated the political and legal system design. This is important because it allows the constitutional court to protect against both violations of human rights and abuse of power.

In other words, yes, constitutional courts decrease legislative autonomy. However, in doing so, they ensure that promote democratic protections. At the same time, legislatures need to also check and balance the constitutional court.

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